Supreme Court, U.S.
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85-1218

No.....

In The

# Supreme Court of the United States

October Term, 1985

—o—

RALPH KEMP, WARDEN,

*Petitioner,*

v.

CHARLES THOMAS CORN,

*Respondent.*

—o—

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

—o—

## PETITION FOR A WRIT OF CERTIORARI

—o—

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## QUESTIONS PRESENTED

1.

Did the United States Court of Appeals for the Eleventh Circuit improperly *sua sponte* reconsider a case after the decision was final and rehearing had been denied by this Court?

2.

Did the Eleventh Circuit Court of Appeals improperly conclude that the charge in the instant case was impermissibly burden-shifting under the holding of this Court in *Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965 (1985)?

3.

Did the Eleventh Circuit Court of Appeals improperly conclude that, even if the charge in the instant case were impermissibly burden-shifting, the charge was not harmless error under the facts and circumstances of the instant case?

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RALPH KEMP, WARDEN,

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v.

CHARLES THOMAS CORN,

*Respondent.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on September 16, 1985, and the denial of a timely motion for rehearing on October 25, 1985.

## OPINIONS BELOW

The Eleventh Circuit Court of Appeals initially entered its opinion denying habeas corpus relief on June 15,

1983. *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983). A copy of said opinion is included in the appendix to the instant petition as Appendix B. The Eleventh Circuit Court of Appeals subsequently *sua sponte* reconsidered one issue in this case and granted habeas corpus relief as to the sentencing charge. Said opinion is reported as *Corn v. Kemp*, 772 F.2d 681 (11th Cir. 1985). A copy of said opinion is included as Appendix C to the instant petition.

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## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 16, 1985. *Corn v. Kemp*, 772 F.2d 681 (11th Cir. 1985). A timely suggestion for rehearing en banc was filed and subsequently denied by the court on October 25, 1985. The instant petition for a writ of certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Respondent, Charles Thomas Corn, was indicted and convicted of malice murder and armed robbery in the Superior Court of Clayton County, Georgia. On May 29, 1976, Respondent was sentenced to death on each count by the same jury that returned a verdict as to guilt. The death penalty for armed robbery was imposed after the jury found that the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind. O.C.G.A. § 17-10-30(b)(7). The death penalty was imposed for the offense of murder after the jury found three statutory aggravating circumstances, that is, that the murder was committed during the course of another capital felony, that the murder was committed for the purpose of receiving money and that the murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind. O.C.G.A. § 17-10-30(b) (2), (4) and (7).

Respondent subsequently filed a notice of appeal in the Supreme Court of Georgia challenging his convictions and sentences. That court reversed the death sentence for armed robbery, but affirmed the convictions for murder and armed robbery and affirmed the death sentence for murder. *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977). This Court subsequently denied a petition for a writ of certiorari and a petition for rehearing. *Corn v. Georgia*, 436 U.S. 914, *rhng. denied*, 438 U.S. 908 (1978).

A petition for a writ of habeas corpus was then filed on behalf of the Respondent in the Superior Court of Tattnall County, Georgia in March, 1978. A hearing was held on that petition on August 25, 1978. The Superior

Court of Tattnail County denied habeas corpus relief on December 7, 1978. The Supreme Court of Georgia subsequently granted a certificate of probable cause to appeal and considered the merits of the allegations presented. After considering the allegations, that court affirmed the denial of habeas corpus relief. *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979).

The Respondent then filed a petition for habeas corpus relief in the United States District Court for the Northern District of Georgia, Atlanta Division, pursuant to 28 U.S.C. § 2254. An evidentiary hearing was held before the magistrate on June 17, 1980. A report and recommendation was entered by the Magistrate on December 30th, 1980 in which the magistrate recommended that habeas corpus relief be granted as to the jury instructions at the guilt-innocence phase. On June 30, 1981, the district court issued an order in which it declined to follow the magistrate's report and recommendation as to the jury instructions; however, the district court granted habeas corpus relief based on a comment by the trial court during the sentencing phase of the trial. *See* Appendix A.

Petitioner Kemp and Respondent Corn filed notices of appeal from the decision entered by the district court. The panel of the Eleventh Circuit Court of Appeals reversed the district court's opinion insofar as it granted habeas corpus relief and affirmed the remainder of the district court's decision, thereby denying habeas corpus relief on all counts, in particular, denying relief on the allegation concerning the charge at the guilt-innocence phase. *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983); Appendix B. A subsequent suggestion for rehearing en banc was filed by Respondent Corn which was denied by

the Eleventh Circuit Court of Appeals on August 11, 1983. *Corn v. Zant*, 714 F.2d. 159 (11th Cir. 1983).

Respondent Corn then filed a petition for a writ of certiorari in this Court. On May 29, 1984, this Court denied said petition. *Corn v. Zant*, — U.S. —, 104 S.Ct. 267 (1984). The mandate was issued by the Eleventh Circuit Court of Appeals on May 11, 1984 and was made the judgment of the district court on June 20, 1984.

On or about June 25, 1984, Respondent Corn filed a petition for rehearing and an application for suspension of the effect of the order denying the petition for a writ of certiorari in this Court. On June 26, 1984, the Eleventh Circuit Court of Appeals *sua sponte* recalled the mandate from the district court and directed that the mandate be held pending disposition of three cases that were then pending *en banc* before the appellate court.

This Court subsequently directed a response be filed to the application for suspension. A response was filed by Petitioner Kemp in early July, 1984. On August 2, 1984, this Court denied the petition for rehearing; however, the mandate still did not issue from the Eleventh Circuit Court of Appeals. *Corn v. Zant*, — U.S. —, 105 S.Ct. 23 (1984).

Subsequently, Petitioner Kemp filed a motion to issue the mandate. On September 16, 1985, the panel of the appellate court issued an order denying the motion to issue the mandate and, apparently, *sua sponte* conducted its own rehearing of a case that had been completed both in that court and in this Court. The panel then concluded that the case should be reversed simply upon finding that the same language was present in this

case as was present in the case of *Francis v. Franklin*, — U.S. —, 104 S.Ct. 1965 (1985). Petitioner Kemp subsequently filed a petition for rehearing *en banc* challenging that decision by the Eleventh Circuit Court of Appeals. That petition for rehearing was denied on October 25, 1985.

Petitioner Kemp now files the instant petition for a writ of certiorari challenging the final decision by the United States Court of Appeals for the Eleventh Circuit.

———o———

## STATEMENT OF FACTS

Respondent was indicted in Clayton County, Georgia, during the August Term, 1975, for armed robbery and murder. Prior to trial a special plea of insanity was heard before a jury and the jury found Respondent competent to stand trial. The case then proceeded to a jury on the issue of guilt or innocence at which the following facts were shown.

Two female friends of the victim, Mary Long, came by a Stop-And-Go store where the victim worked at about 5:30 p.m. on August 15, 1975. Both witnesses identified the Respondent as the young man they saw in the store at that time. The Respondent spoke with the two girls and also asked Ms. Long if her boss was there. When the two girls left the store around 6:00 p.m., the Respondent was still in the store.

A short while later, several customers stopped by the store. These customers identified Respondent as the man

who waited on them at the store. All of these customers noted that Respondent had blood on his hands and arms. They also testified that Respondent was wiping up blood and tinkering with the cash register. There was blood on the cash register and the counter and the Respondent had a rag wrapped around his right hand.

Respondent told one of the customers that he had been robbed. Another customer testified that Respondent told her a drunk person with a knife had tried to rob him and that he had been cut in the struggle. When this customer offered to call someone to help, Respondent told her he had already notified the authorities. The witness noted that the cash drawer of the register was open.

Mark Crabb, a frequent customer at the store, stopped there on August 15th and saw Ms. Long. At this same time, Crabb saw a man dressed in jeans and a tee-shirt that he later identified at the Respondent. Crabb left the store but returned a short while later to buy some soft drinks. When he entered the store, he did not see anyone and thought Ms. Long was in the back of the store. He then noticed blood on the counter and drops of blood leading to a back room. Crabb opened the door and found Ms. Long on the floor. He felt for her pulse but could not find one. He then called the police.

The autopsy of the victim revealed multiple stab wounds, abrasions and lacerations. There were four major stab wounds, two in the front and two in the back with the fatal wound being in the chest. There were other puncture wounds and cuts with there being a total of seven knife wounds. There were more superficial wounds which could have been inflicted by a knife or other instru-

ment. There were also four blunt force traumas on the body of the victim.

The authorities later determined that $47.00 was missing from the cash register of the store.

On August 17, 1985, the Respondent came to the Riverdale Police Station to pay a traffic ticket. It was noted by several officers that the Respondent fit the description of the suspect in the murder. The Respondent was advised of his rights and questioned about an injury on his hand. He said at that time he had cut his hand on a lawnmower.

Captain Quinlan of the Clayton County Police Department was called. He advised the Respondent of his rights a second time. Respondent signed a waiver and made a statement in which he claimed that he spent Friday afternoon August the 15th riding around with his wife and child, going to a hamburger place and returning home late that night. Captain Quinlan investigated the story and found that it did not check out. He informed the Respondent of this fact and asked the Respondent to accompany him to the Clayton County Police Department. Respondent willingly went with Captain Quinlan.

A *Jackson v. Denno* hearing was held at trial during which Captain Quinlan testified that the Respondent made several different statements. Respondent first claimed that on the evening of August 15th, he was driving on I-85 and that when he came to Roberts Drive, a white van pulled out in front of him and then police cars later followed. Respondent implied that the perpetrator of the murder had been in the van.

At this point Quinlan ended the questioning and Respondent's wife came in to see him. When Respondent's

wife asked him if he had done "it," Respondent replied, "yes, I killed the girl, but I didn't mean to." (T. 618). Captain Quinlan later resumed his conversation with the Respondent. Respondent stated that he went to one store where he talked to a woman but stated he could not bring himself to hurt her. Respondent then stated that he went to a Stop-And-Go store and that the girl there lunged at him. At this point the questioning ceased.

Respondent testified at the *Jackson v. Denno* hearing that he was not advised of his rights and that he had been threatened prior to making the statements. He claimed that all he could remember was being in a Clayton County Hospital and then at Central State Hospital. The trial court ruled that Respondent had been advised of his rights and that the statements were voluntary.

Respondent's mother-in-law testified that Respondent came to her home on August 15th with a cut hand. Respondent told her that a man had run him off the road. He took off his tennis shoes, which were bloody, and threw a rag into a corner. Respondent's wife also testified that she saw him on that evening. Respondent told her that his hand had been cut when a man ran him off the road and pulled a knife on him. She further testified that Respondent had beaten her on occasion and pushed her down the stairs at one time. She testified that Respondent was not insane, but that he was smart and had a violent temper.

Respondent did not deny committing the crime, but chose to assert a defense of insanity. The only witness presented by the Respondent at trial was Dr. William Sapp. Dr. Sapp testified that Respondent had abnormal

reflexes indicating some damage to the central nervous system. Dr. Sapp also testified that Respondent exhibited four major symptoms of schizophrenia and that from Respondent's descriptions, he had seizures of some type. In Dr. Sapp's opinion, Respondent was paranoid and was not capable of knowing right from wrong on the date of the crime.

Dr. Miguel Bosch testified in rebuttal. Dr. Bosch testified that Respondent was not schizophrenic, was not paranoid and was not psychotic. Dr. Bosch specifically refused to give an opinion as to whether Respondent knew right from wrong on the date of the crime, stating that it was impossible for him to give such an opinion without observing the Respondent on that date and because the Respondent specifically stated he did not remember anything about the crime and never told the psychiatrist anything about the crime.

Further facts will be developed as necessary to elaborate on the issues presented in the instant petition.

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## REASONS FOR GRANTING THE WRIT

### A. The Eleventh Circuit Court Of Appeals Improperly Granted Relief Sua Sponte After Litigation Had Been Completed In The Case.

Petitioner submits that the Eleventh Circuit Court of Appeals lacked jurisdiction to *sua sponte* rehear the case and grant relief as it did. A review of the procedural history set forth previously shows that the mandate in this

case had issued pursuant to the federal rules and that the circuit court *sua sponte* recalled the mandate at a time when a petition for rehearing was pending in this Court. This Court subsequently denied rehearing in the case, thus completing litigation in the matter. Obviously, this Court had before it a consideration of whether the granting of certiorari in *Francis v. Franklin, supra,* would affect this case when it decided to deny the petition for rehearing as Justice Powell indicated he would hold the case pending *Franklin.* Petitioner would submit that the denial of the petition for rehearing should have completed litigation in the matter and that the Eleventh Circuit Court of Appeals should not have *sua sponte* reconsidered the case at that point in time. At the time that the court reconsidered the case, the only act left to be done to complete the litigation was the administrative function of sending the mandate to the district court again.

The actions by the Court of Appeals in the instant case resulted in a complete disregard of the right of the parties to finality in the judgment of the court. The procedure followed in the instant case could be utilized by any circuit court as an indefinite delay simply by asserting that there is a new or pending case which "could" affect a case. This tactic ignores the presumption of finality which attached to the instant conviction following this Court's denial of certiorari and the petition for rehearing. *See Barefoot v. Estelle,* — U.S. —, 103 S.Ct. 3383 (1983).

Therefore, Petitioner would submit that the Eleventh Circuit Court of Appeals improperly reconsidered its opinion in this case.

### B. The Eleventh Circuit Court Of Appeals Improperly Concluded That The Charge In The Instant Case Violated This Court's Holding In Sandstrom v. Montana, 442 U.S. 510 (1979).

Petitioner submits that this Court should grant the instant petition for a writ of certiorari to consider the Eleventh Circuit Court of Appeals' ruling that the charge in the instant case violated the principles of *Sandstrom v. Montana, supra.* Petitioner submits that the Eleventh Circuit did no more than note that there were two sentences present in the instant charge that were present in the charge in *Francis v. Franklin, supra,* and granted relief without giving consideration to the charge as a whole and the facts and circumstances of the entire case. Thus, the court failed to comply with this Court's holding in *Cupp v. Naughten,* 414 U.S. 141 (1973), requiring that instructions be viewed in the context of the overall charge. Even this Court in *Francis v. Franklin, supra,* recognized that the jury heard more than just the two challenged sentences in that case. "The jury charge taken as a whole might have explained the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion." *Francis v. Franklin, supra,* 105 S.Ct. at 1973. In the instant case, the Eleventh Circuit Court of Appeals simply failed to conduct this type of analysis at all but held, "the instructions to the jury in Corn's trial were virtually identical to those held unconstitutional in *Franklin* and in this Court's subsequent decisions. . . ." *Corn v. Kemp, supra.* The court simply cited to two sentences out of *Francis v. Franklin,* noted that these sentences were present in the

charge in the instant case, and determined that the charge was impermissibly burden-shifting.

In the first opinion by the Eleventh Circuit Court of Appeals, the court fully reviewed the charge as a whole and concluded that the charge was not impermissibly burden-shifting. In that opinion, the court focused on the Respondent's claim that the sanity charge when taken in conjunction with other instructions could have "caused the jury to believe that the defendant had the duty to negate the element of malice." *Corn v. Zant*, *supra*, 708 F.2d at 558. The court noted in that opinion that the prior cases of the Eleventh Circuit were not dispositive because the instructions in each case differed in length and phraseology and that none was identical to the charge given in the instant case. The court concluded, "in light of the overall charge of the court, we do not believe that the burden of proof was shifted to Corn to demonstrate a lack of malice." *Id.* at 559. The court noted that the charge in the instant case contained language that the presumption could be rebutted and that a person would not be presumed to act with criminal intention. Petitioner notes that these charges were also present in *Francis v. Franklin*, but there was other language present in the instant case, acknowledged by the first panel opinion in *Corn v. Zant*, that was not present in *Francis v. Franklin*.

The first panel opinion noted, "the instructions were clear that the accused 'may' show circumstances to negate intent, 'but he is not required to do so', and that he 'may' show that the killing was done without malice, '[b]ut he is not required to do so.'" *Corn v. Zant*, 708 F.2d at 559. The court stated that the charge concerning malice noted

that any such presumption did not arise unless it was shown beyond a reasonable doubt that the Respondent was the intentional slayer. The court concluded, "[a]t most, there was a permissible inference (footnote omitted) that the defendant *could*, if he so chose, introduce mitigating evidence." *Id.* (emphasis in original). The court went on to conclude, "the instructions in this case were fair and balanced in both tone and content." *Id.* at 560. The court concluded that when considering the charge as a whole there was no due process violation, *citing Sandstrom v. Montana*, *supra* and *County Court of Ulster v. Allen*, 442 U.S. 140 (1979).

Inexplicably, after this Court denied a petition for a writ of certiorari and after this Court had denied a petition for rehearing, in spite of the granting of a petition for a writ of certiorari in *Francis v. Franklin*, *supra*, the panel reversed itself without explanation, selected two sentences from the charge, and determined that the charge somehow now was not balanced in tone and content. Petitioner submits that this type of analysis clearly fails to follow this Court's mandate to consider the charge as a whole in each and every case.

A further consideration of the charge in the instant case reveals that insanity was the defense presented. A consideration of the charge on insanity shows that the court fully charged on the burden of proof in regard to insanity. A consideration of this charge in conjunction with the remainder of the charge shows that the jury was thoroughly instructed as to the burden of proof at all phases of the trial. A consideration of the charge as a whole shows that the burden of proof was not impermissibly

shifted. Thus, Petitioner submits that the Eleventh Circuit Court of Appeals improperly failed to consider the charge as a whole in this case and that the charge should not be found to be impermissibly burden-shifting under *Francis v. Franklin*, *supra* and *Sandstrom v. Montana*, *supra*.

### C. Even If The Charge In The Instant Case Were Found To Be Burden-Shifting, The Eleventh Circuit Court Of Appeals Improperly Concluded That The Charge Was Not Harmless Error.

Although Petitioner does not concede that the charge was burden-shifting, Petitioner submits that this Court should grant the instant petition to determine the applicability of a harmless error analysis to the facts and charge in the instant case. This Court has yet to decide the applicability of a harmless error analysis in a *Sandstrom v. Montana* context, although various Justices of this Court have noted that there are certain circumstances where it might be applicable. In *Connecticut v. Johnson*, 460 U.S. 73 (1983), Justice Blackmun noted the following for the plurality:

> A *Sandstrom* error may be harmless if the defendant conceded the issue of intent. (Cites omitted). In presenting a defense such as alibi, insanity, or self-defense, a defendant may in some cases admit that the act alleged by the prosecution was intentional, thereby sufficiently reducing the likelihood that the jury applied the erroneous instruction as to permit the appellate court to consider the error harmless.

*Id.* at 87.

Recently, in *Bowen v. Kemp*, 769 F.2d 672 (11th Cir. 1985), the Eleventh Circuit Court of Appeals considered the applicability of the harmless error rule to a case involving an insanity defense. The court focused on the so-called "*Franklin*" language and noted that "the offensive presumption would not become operative unless and until the jury found that Bowen was 'a person of *sound mind* and discretion.'" *Id.* at 667 (emphasis in original). Thus, if the jury had accepted the insanity defense in that case, and Bowen was found to be a person of unsound mind, the jury could not follow the presumption and find that he intended the natural and probable consequences of his acts based solely on the presumption. The court then noted that the jury obviously did not accept the defense put forth by Bowen and that the jury could have relied on the presumption. "By that point, however, Bowen's sole defense had already fallen by the wayside, and intent was no longer a viable issue in the trial." *Id.* In *Bowen, supra*, the court concluded that "here, unlike the situation in *Franklin*, the defendant's sole defense had been 'completely eliminated' before the proscribed presumption could have become operative." *Bowen v. Kemp, supra* at 678.

In the instant case, the language found to be similar to that in *Francis v. Franklin, supra*, has the same effect as that found in *Bowen v. Kemp, supra*. The "presumption" would only apply if the person were already found to be of sound mind and discretion. If that were the case, then the jury would already have rejected the defense of insanity and the presumption would simply be superfluous, i.e., relating to an element of the crime which was not in issue anymore. Thus, under these circumstances, the charge should be found to be harmless error.

That portion of the charge regarding malice also is harmless. The charge repeatedly informed the jury that the Respondent was not required to produce any evidence and that if the evidence at trial disclosed the homicide was done without malice, there was no presumption of malice. Thus, the jury was fully instructed in this regard and the burden of proof was not impermissibly shifted as to malice.

Therefore, Petitioner submits that this Court should grant the instant petition to consider the applicability of the harmless error doctrine to the charge in the instant case and conclude that the Eleventh Circuit Court of Appeals improperly found that the error was not harmless.[1]

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[1]In its second opinion, the Eleventh Circuit Court of Appeals noted that it did not reach the harmless error question in its first opinion because the state failed to raise it. It should be noted that the state did not present the harmless error analysis because the district court had not found the charge to be improper. Thus, there was no need for the state to make a harmless error argument as it was asserted continually that the charge was not burden-shifting at all. The panel in the second opinion simply disposed of the harmless error analysis in one sentence in a footnote.

## CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to review the decision by the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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# APPENDICES

## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
No. C 79-2146 A

CHARLES THOMAS CORN,
Petitioner,

vs.

WALTER ZANT, Warden,[1] Georgia Diagnostic and Classification Center,
Respondent

O R D E R

Petitioner, Charles Thomas Corn, a state prisoner currently incarcerated at the Georgia Diagnostic and Classification Center in Jackson, Georgia, filed this writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner challenges his 1976 conviction for the murder of Mary Long and his conviction for armed robbery by a jury in Clayton County and his sentence to death on the murder charge, urging numerous grounds for relief. The magistrate issued his report and recommendation on December 3, 1980, recommending that the petitioner's writ be granted and a new trial ordered. Both the petitioner and the respondent filed responses to the report, and the matter is now before this court for determination.

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[1] Walter Zant has succeeded Charles Balkcom as Warden at the Georgia Diagnostic and Classification Center and is, therefore, substituted as the proper respondent.

Among his grounds for relief, the petitioner alleges that (1) he was denied the effective assistance of counsel in violation of his Sixth and Fourteenth Amendment rights; (2) no aggravating circumstances existed to warrant a charge under Ga. Code Ann. § 27-2534.1(b)(7); (3) the charge given by the trial judge impermissibly shifted the burden of proof to the petitioner as to the element of malice; and (4) the sentencing procedure violated his constitutional rights when the trial judge made a reference to the mandatory appellate process. The petitioner presents numerous other grounds for relief in his petition; however, this court is of the opinion that these arguments are effectively addressed in the magistrate's report and require no further comment here. As to the allegations listed above, this court will respond to them separately.

I. Ineffective Assistance of Counsel

The petitioner first contends that his trial counsel failed to adequately represent him through his failure to pursue certain defenses, raise certain objections, and file certain motions. An evidentiary hearing on this issue was held before the magistrate on June 17, 1980, and in his report and recommendation the magistrate concluded that petitioner had been afforded effective assistance. The court agrees.

The Sixth Amendment right to reasonably effective counsel does not mean errorless counsel or counsel judged ineffective by hindsight. Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980); Johnson v. Massey, 516 F.2d 1001 (5th Cir. 1975). The test for resolving this issue is whether petioner was represented by counsel reasonably likely to ren-

der and in fact rendering reasonably effective assistance. Kemp v. Leggett, 635 F.2d 453 (5th Cir. 1981); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974), quoting MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir.), *cert. denied*, 368 U.S. 877 (1960). With respect to a general due process claim under the Fourteenth Amendment, constitutionally ineffective assistance of counsel occurs when the whole proceeding is "fundamentally unfair." Fitzgerald v. Estelle, 505 F.2d 1334 (5th Cir. 1974) (en banc), *cert. denied*, 422 U.S. 1011 (1975).[2] Under either standard, the petitioner's allegations are without merit, and this court adopts with approval the report and recommendation of the magistrate in this regard.

In resolving a charge of ineffective assistance of counsel, the court must inquire into the actual performance of counsel conducting the defense and determine whether reasonably effective assistance was rendered, based on the totality of circumstances and the entire record, not isolated instances taken out of context. Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981).

Specifically, the petitioner urges that his trial counsel's failure to order the recordation of the opening and closing remarks in his trial resulted in a violation of his right to effective counsel. This contention is without merit, since failure to transcribe counsels' arguments are not constitutional violations requiring vacation of a death sentence. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), *reh.*

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2 We note that retained counsel are now held to the same constitutional standard of representation as are appointed counsel. Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980); United States v. Hughes, 635 F.2d 449 (5th Cir. 1981).

*denied*, — F.2d —, Slip No. 8158, June 18, 1981. Furthermore, the failure of the petitioner's counsel to object to the argument must be seen as evidence that there was nothing said that would be prejudicial to the petitioner, and that the jury received the case solely on the basis of the evidence presented. Stephens v. Zant, *supra*.

The petitioner's other contentions regarding ineffective assistance of counsel based on his counsel's trial strategy are equally without merit. The petitioner strongly objects to his trial counsel's failure to pursue a "delusional compulsion" defense of insanity rather than the *M'Naughton* insanity test during trial, the failure to file a *Brady* motion, the failure to make numerous objections, and the failure to file a motion for new trial instead of an appeal. All of these decisions made by the petitioner's counsel were made in consideration of the strategy counsel wished to use during trial. The magistrate correctly noted that unless there are exceptional circumstances or unless the trial attorney is so incompetent as to deprive a defendant of a right to effective assistance of counsel decisions regarding trial strategy must be binding. Coco v. United States, 569 F.2d 367 (5th Cir. 1978). Furthermore, tactical decisions do not constitute ineffective assistance of counsel simply because, in retrospect, it appears that counsel chose the wrong course. Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981).

For example, counsel's failure to object to the instructions given to the jury does not constitute ineffective assistance of counsel. Easter v. Estelle, 609 F.2d 756 (5th Cir. 1980). As to the petitioner's claim regarding the failure to file a *Brady* motion, the evidence as presented revealed that the police department file, which was handed

over to the petitioner, contained no material subject to a *Brady* motion. Also, counsel's tactical decision to file an appeal instead of a motion for new trial in no way prejudiced the petitioner so as to violate any constitutionally protected right.

The petitioner also objects to his trial counsel's failure to use the "delusional compulsion" defense at trial instead of the "right/wrong" *M'Naughton* test. Even though this decision was part of the trial strategy of the petitioner's counsel and is therefore binding, Coco v. United States, *supra*, an additional comment regarding the petitioner's objection is necessary. In order for the defense of delusional compulsion to be available in a trial for murder, there must be some evidence that the defendant was laboring under a delusion, that the act itself was connected with the delusion, and, furthermore, that the delusion would, if true, justify the act. Ga. Code Ann. § 26-703; Graham v. State, 236 Ga. 378 (1976). Under this test, it is necessary that the accused be aware of the delusion he is under and, more specifically, be able to recall being under that delusion. Petitioner Corn repeatedly testified at trial that he was suffering from a complete lack of memory as to the events of August 15, 1975, the date of Mary Long's murder. If the petitioner could not remember anything on that particular day, he cannot now come forward and contend with any credibility that he was suffering from a delusion. As the magistrate noted, it is difficult, if not impossible, to raise a delusional compulsion defense when the defendant fails to relate any delusion that he suffered at the time the murder was committed. The petitioner's trial counsel chose the defense he thought best based on the circumstances, and the peti-

tioner cannot claim that that choice so prejudiced his trial so as to make it constitutionally impaired.

In sum, the petitioner has failed to allege any error made by his trial counsel that would violate a specific constitutional right or that was so prejudicial so as to deny fundamental fairness violative of the Fourteenth Amendment due process clause. Nor has the petitioner shown that his counsel failed to render reasonably effective assistance of counsel as required by the Sixth Amendment. The petitioner's counsel in this case met the standard requiring that he "be capable of rendering and actually did render reasonably effective assistance, based on the totality of the circumstances." Nelson v. Estelle, 642 F.2d 903 (5th Cir. 1981). Therefore, this court adopts with approval the magistrate's determination that the petitioner's counsel was not ineffective as a matter of law.

## II. Aggravating Circumstances under Ga. Code Ann § 27-2534.1(b)(7)

The petitioner contends that the sentence under Ga. Code Ann. § 27-2534.1(b)(7) is unconstitutional in that it was applied arbitrarily and capriciously and in violation of the United States Supreme Court's recent decision in Godfrey v. Georgia, — U.S. —, 100 S.Ct. 1759 (1980).[3]

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[3] *Godfrey* is factually distinguishable from the case at bar and is, therefore, inapplicable. In *Godfrey*, the Supreme Court was disturbed that since there was no evidence of any torture or aggravated battery to the victim, there was no way to distinguish Godfrey's death sentence from other murder cases where death was not imposed. Here, there is substantial objective evidence of aggravated battery, and the jury in petitioner's trial cannot be accused of imposing the death sentence on the basis of emotion rather than reason.

Georgia Code Annotated § 27-2534.1(b)(7) states in pertinent part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence: . . . (7) the offense of murder, rape, armed robbery, or kidnaping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

Under this statute, a jury must determine whether the murder showed a depravity of mind in that it involved either aggravated battery or torture to the victim, or was outrageously, or wantonly vile.

There was no evidence presented of torture in the instant case. Therefore, a section (b)(7) charge was necessarily based on aggravated battery to the victim, Mary Long. In Georgia, aggravated battery occurs when a person maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof. Ga. Code Ann. § 26-1305. Furthermore, in order to constitute aggravated battery for purposes of the section (b)(7) requirement, the victim must suffer the bodily harm before death. Godfrey v. Georgia, *supra*.

Mary Long died as a result of numerous stab wounds inflicted to her chest and surrounding areas, lacerations to the face, and multiple abrasions to her head and surrounding area. Petitioner argues:

> Here, the facts of the instant case cannot fairly be found to support a section (b)(7) death sentence because the crime did not involve torture, aggravated battery, etc. as required. True, the victim was stabbed several times, but several of the wounds would have been fatal. *It is doubtful that she was in too much pain for very long.*
>
> Brief in Support of Petitioner's Attack on Being Sentenced Under Ga. Code Ann. § 27-2534.1(b)(7) in Light of the *Godfrey* Decision, at 2-3 (emphasis added).

This strained argument implicity recognizes the bodily harm and disfigurement suffered by Mary Long prior to her death; the argument that pain may not have lasted very long because death ensued shortly after or during the stabbing might present an intriguing topic for philosophical discussion in the halls of academia, but it totally ignores the point that section 27-2534.1(b)(7) requires only that the bodily harm come before death, not that pain accompany the murder. The court is unpersuaded by this spurious argument and finds that the petitioner's conviction under this section was proper.

III. Burden Shifting Instructions

The petitioner strenuously urges that his conviction was unconstitutional in that the charge given by the trial court impermissibly shifted the burden of proof onto the petitioner as to his mental condition at the time of the offense, in violation of Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979). The petitioner claims that the judge's charge on malice as an element of the crime of murder required the petitioner, rather than the state, to prove this essential element of the alleged crime. The petitioner contends that the charge could have been interpreted by

the jury as a mandatory and conclusive presumption, thereby shifting the burden of proof onto him.

Before resolving this issue on the merits, this court recognizes that the question of the retrospective application of *Sandstrom* has never been decided by this circuit. *See* Mays v. Balkcom, 631 F.2d 48 (5th Cir. 1980); United States v. Spiegel, 604 F.2d 961, 969 n. 15 (5th Cir. 1979).

The criteria for deciding whether to apply a new constitutional rule of criminal procedure, such as the prohibition of burden shifting instructions, are set out in Adams v. Illinois, 405 U.S. 278, 92 S.Ct. 916 (1972). *See also* Stovall v. Deno, 388 U.S. 293, 87 S.Ct. 1967 (1967); Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1966). In determining this issue, the court must examine three criteria: (1) the purpose to be served by the new standard; (2) the extent of the reliance by law enforcement authorities on the old standard; and (3) the effect on the administration of justice of a retroactive standard and the application of the new standard. The constitution neither prohibits nor requires retrospective application of a judicial decision, and a retrospective application of a judicial decision depends on a pragmatic balancing of the public interest against the gravity of the right involved. Linkletter v. Walker, *supra*. Complete retroactive effect of a new decision has been given where the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. Adams v. Illi-

nois, 405 U.S. at 280, 92 S.Ct. at 918; Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1152 (1971).[4]

The question of whether the constitutional rule of criminal procedure enhances the reliability of the fact-finding process at trial is necessarily a matter of degree and is a question of probabilities. Johnson v. New Jersey, 384 U.S. 719, 728-729, 86 S.Ct. 1772, 1778 (1966). Not every decision that tends incidentally to avoid unfairness at trial must be afforded retroactive effect. Only when an assessment of those probabilities indicates that the condemned practice casts doubt on the reliability of determinations of guilt in past criminal cases must a new procedural rule be applied retroactively. Brown v. Louisiana, — U.S. —, 100 S.Ct. 2214 (1980).

In applying the three criteria set forth in *Linkletter*, the court must give primary consideration to the first factor—the purpose to be served by the new rule. Controlling significance is given to the remaining two factors when the first factor does not clearly favor retroactivity or prospectivity. Brown v. Louisiana, *supra*. The Supreme

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[4] Examples of retrospective application of constitutional decisions include: the right to counsel at trial, Gideon v. Wainwright, 372 U.S. 335 (1963); right to counsel on appeal, Douglas v. California, 372 U.S. 353 (1963); and, most recently, protection against conviction by a non-unanimous six person jury, Brown v. Louisiana, — U.S. —, 100 S.Ct. 2214 (1980). Examples of decisions which have not been given retroactive effect include: right to counsel at the preliminary hearing, Adams v. Illinois, 405 U.S. 279, 92 S.Ct. 916, 972 (1972); right to counsel at a line-up, Foster v. California, 394 U.S. 440, 89 S.Ct. 1127 (1969); rule of Mapp v. Ohio excluding evidence seized in violation of the Fourth Amendment, Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731 (1965).

Court, in *Sandstrom*, does not clearly indicate whether the decision should be applied retroactively.[5] Therefore, the court must necessarily examine the second and third criteria of *Linkletter*—the extent of the reliance by law enforcement authorities on the prior practice and the impact on the administration of the justice of a retroactive application of the new decision. With these principles in mind, the court concludes that the rule of Sandstrom v. Montana need not be given retroactive effect.

United States v. Chiantese, 560 F.2d 1244 (5th Cir. 1977), provides some guidance in this area. There, the Fifth Circuit explicitly refused to apply its decision retrospectively after considering the adverse impact a retroactive standard would have on the administration of criminal law. In that case, the court set forth a set of instructions that it considered proper as to a charge on murder and also set forth language it would consider in the future

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[5] It is true that the Supreme Court, in Hankerson v. North Carolina, 432 U.S. 233, 97 S.Ct. 2339 (1977), applied the rule in Mullaney v. Wilbur, 421 U.S. 684 (1975) retroactively. However, the two sets of instructions in *Mullaney* and in *Sandstrom* are different. In *Mullaney*, Maine law required a defendant charged with murder to prove that he acted in the "heat of passion" instead of provocation. This charge did not shift the burden of proof to the defendant; rather, the burden was placed on him initially, a much harsher instruction than that given in *Sandstrom*. The charge as given in *Sandstrom* placed a presumption of intent on the accused, a presumption which arose from the "ordinary consequences of his voluntary acts". Since the burden of proof in *Sandstrom* was not initially placed on the accused, this distinguishes the charge from the one given in Mullaney v. Wilbur. Therefore, the fact that Mullaney v. Wilbur is to be applied retrospectively does not require this court to apply Sandstrom v. Montana in the same manner.

to be impermissible. However, the court recognized that the law in this area has been unclear and unpredictable, and because retrospective application of this decision would have a devastating impact on the administration of criminal law, the court held that its decision would only be applied prospectively, ninety days after its decision.

The same considerations apply in the case at bar. Numerous murder charges given in the past have been couched in language that courts now find to be unacceptable in that they appear to shift the burden of proof onto the defendant. However, retrospective application of a prohibition against that language would invalidate a practice of formerly unquestioned legitimacy and would affect the validity of all murder convictions in the past. The impact of a retrospective application of *Sandstrom* would be devastating to the administration of criminal justice, in that every charge would have to be reexamined for any suspect language. Additionally, the decision in *Sandstrom* is not so sweeping so as to give the courts conclusive guidance concerning the language that should or should not be used in a charge to the jury. The decision in *Sandstrom* concerned language peculiar to that case alone; it is not clear from that decision what language is permitted and what language will be considered to be burden shifting. The number of persons who would have to be re-tried or released would tax the administration of criminal justice to the utmost, and this disruption requires this court to conclude that *Sandstrom* should be applied only prospectively.

However, even if this court should hold that *Sandstrom* is to be applied retrospectively, it would still con-

clude that the charge as given by the trial judge in the instant case was proper and did not shift the burden of proof to the petitioner on the element of malice.

The Due Process Clause of the Fourteenth Amendment protects an accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1973 (1970); *accord*, Patterson v. New York, 432 U.S. 197, 97 S.Ct. 2319 (1977); Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881 (1975). For instance, a charge by the trial court that permits the jury to presume the element of intent from the proof of facts which are insufficient to establish the crime would be unconstitutional. Sandstrom v. Montana, *supra;* Tennon v. Ricketts, 642 F.2d 161, 163 (5th Cir. 1981). The decision in *Sandstrom* is designed to protect an accused from having to disprove an essential element of an offense because of a presumption against him. Whether a defendant has been afforded his due process rights depends on how a reasonable juror could have interpreted the judge's instruction. Sandstrom v. Montana, — U.S. —, 99 S.Ct. 2454.

Therefore, if a charge involves a presumption that shifts the burden of proof onto the accused, the charge must be declared unconstitutional. In determining the

constitutionality of a particular charge, the court must examine it as a whole[6] and answer the following question: Did the charge, as presented, relieve the state of proving every element of a criminal offense beyond a reasonable doubt by shifting that burden to the accused? A careful examination of the charge given to the jury in the instant case compels this court to conclude that the charge was proper.

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6 When an appellate court reviews the adequacy of an instruction to the jury, it must view the charge as a whole. Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400 (1973); United States v. Brooks, 611 F.2d 614 (5th Cir. 1980). Only when the charge, taken in its entirety, fails to fairly present the issues to the jury will error be found. Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), *reh. denied*, — F.2d —, Slip No. 8158, June 18, 1981. The court may also look for any curative language, a factor which may (especially if the language is in proximity to the allegedly impermissible charge) mitigate the effect of the charge. *See* United States v. Chiantese, 582 F.2d 974 (5th Cir. 1978) (on rehearing and remand from en banc decision, 560 F.2d 1244 (5th Cir. 1977)); United States v. Durham, 525 F.2d 1281, 1288 (5th Cir.), *cert. denied*, 423 U.S. 871 (1975) (noting significance of proximity but finding even remotely placed instructions to cure error). This court notes that the trial judge's charge, set out *infra*, is replete with statements to the effect that the state has the burden of proving malice (and thereby intent) beyond a reasonable doubt (Transcript, p. 992), that the accused does not have to come forward with any evidence (Transcript, pp. 991-92), and that if the jury had "a reasonable doubt as to the defendant's guilt as to the offense of murder, it would be your duty to acquit the Defendant of the offense of murder." (Transcript, p. 993). In addition to the court's opinion that the charge itself was not burden-shifting, the court thinks that whatever untoward effect the instruction may have had in this case was vitiated by this curative language concerning the state's responsibility in proving intent beyond a reasonable doubt.

The charge given by the trial judge reads, in part, as follows:

> I charge you that a person commits murder when he unlawfully and with malice aforethought, either express or implied causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element in a murder and it must exist for before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of the slayer the moment before he inflicts the fatal wound, that is sufficient.
>
> The law presumes every homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation, or excuse. The accused may show such circumstances to the jury unless such circumstances appear from the evidence produced against the accused. But he is not required to do so. If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist. If however the evidence produced against the accused, if there be such, does not disclose that the killing was done without malice, the accused may show that it was done without malice. But he is not required to do so.
>
> I charge you, however, that this presumption which arises against the slayer where an intentional

homicide is shown does not arise against the slayer where an intentional homicide is shown does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt that the defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the defendant himself, the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the defendant may but is not required to, show mitigation or excuse.

I further charge you that it is for you, the jury, to say whether the evidence in this case, the testimony and all of the facts and circumstances, sufficiently identify this defendant as the slayer beyond a reasonable doubt. It is not necessary that the defendant prove another person committed the offense.

I charge you that the acts of a person of a sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend of a natural and probable consequences of his acts. If such a person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, and that is you, the jury, in this case, may find such intention upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the acts for which the accused is prosecuted.

(Transcript of record, pp. 990-93).

The petitioner alleges that this charge shifted the burden of proof as to the element of malice onto him and relieved the state of proving beyond a reasonable doubt that he acted with malice, an essential element of the crime of murder. In Georgia, malice can be either express or implied, and must be established before an accused can be convicted of the charge of murder. Ga. Code Ann. § 26-1101. Malice may be express, which is a deliberate intention unlawfully to take away the life of a fellow creature, and which must be manifested by external circumstances capable of proof. If malice is not express, it is implied, and can be implied in two ways: (1) where no considerable provocation appears, and (2) where all the circumstances of the killing show an abandon and malignant heart. Ga. Code Ann. § 26-1101. The state must prove beyond a reasonable doubt that the killing was with malice, either express or implied.

The state may show express malice by proving beyond a reasonable doubt that the defendant acted with deliberate intention to unlawfully take the life of a fellow creature. Or, the state may prove beyond a reasonable doubt that the defendant killed where there was no provocation and that the circumstances showed an abandoned and malignant heart. This is implied malice. Petitioner objects to the word "implied" throughout the judge's charge and contends that this shifted the burden of proof onto him as to the element of malice. However, the words "express" and "implied" are simply descriptive of the kinds of malice which the state must show existed beyond a reasonable doubt before the defendant can be found guilty of murder. The use of the word "implied" in no way requires the defendant to prove the absence of malice.

The court finds it highly significant that if the burden were truly shifted to the defendant, the code section and the charge would allow the jury to *infer* malice from the circumstances. The use of the word "implied" rather than "inferred" or "presumed" buttresses the court's position that "implied" is more a description of a type of malice rather than the procedure by which malice is to be found. The charge, as given, only describes the burden of the state to prove the element of malice. Whether it be express malice or implied malice, it is the *state* which must prove the elements which establish that the killing was done with malice. The charge as given simply expands on the definition of murder as set forth in Ga. Code Ann. § 26-1101.

In United States v. Netterville, 553 F.2d 903 (5th Cir. 1977), the trial judge charged that "the law presumes every man intends the natural and probable consequences of his own knowing acts. . . . Intent can be presumed from the result of the action." The court refused to find this instruction to be plain error because the charge as a whole made the government's burden of proof unmistakably clear. And in United States v. Muckenstrum, 515 F.2d 568 (5th Cir. 1975), the court held that an instruction that a defendant was not required to produce any evidence and might rely on evidence brought out on examination of witnesses for the government did not shift the burden of proof to the defendant.

In the instant case, when the judge's charge is examined in its entirety, it is clear that the burden of proof remained with the state. In no way was the petitioner required to prove or disprove the critical fact in dispute

as has been the situation in other cases which have held instructions to be burden shifting. *See* Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980). Throughout the charge, the trial judge instructed the jury that the prosecution had to prove malice beyond a reasonable doubt and that if the state met its burden of proving malice, malice would be the equivalent of the intent to kill. Therefore, it was the burden of the state to prove the element of intent, an essential element of the crime of murder. When viewed in its entirety, the charge as given in the instant case in no way undermined the fact finder's responsibility at trial, based on the evidence adduced by the state, to find the ultimate facts beyond a reasonable doubt. *See* County Court of Ulster County, New York v. Allen, — U.S. —, 99 S.Ct. 2213, 2224 (1979).

Because this court is of the belief that a reasonable juror could not have interpreted the charge given by the trial judge as shifting the burden of proof onto the accused, we decline to adopt that portion of the magistrate's report and recommendation.

IV. Improper Sentencing Procedure

Finally, the petitioner objects to the comment made by the trial judge during the sentencing phase of the trial, in which the judge stated that should the jury impose the death penalty, there would be a mandatory appeal to the Georgia Supreme Court. The petitioner alleges that this statement violated his constitutional rights in that it tended to diminish the jury's responsibility for its final verdict. In his report and recommendation, the magistrate rejected this argument, concluding that "there is no requirement under Georgia law that jurors be ignorant of

the appeal rights of defendants" (Magistrate's report and recommendation, p. 42), and that "a succinct remark that there is a mandatory appeal of death sentence cases does nearly so seriously impact upon the jury's responsibility for its decision." (Magistrate's report and recommendation, p. 42). This court disagrees and declines to adopt the report and recommendation in this regard. Although jurors may be aware of the existence of the appellate process, the court cannot assume that they are conversant with the scope and limits of appellate review.

Although this issue has not been addressed at length by this court, it is well established under Georgia law that it is error for a *prosecutor* in a criminal trial to remark on the right of direct appeal of a death sentence. Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977), Prevatte v. State, 233 Ga. 929, 214 S.E. 2d 365 (1975). The Georgia Supreme Court views references by prosecutors to a defendant's right to appeal as diminishing the consequences of a jury verdict or diverting from the jury the duty to decide a case upon the merits. Any remark regarding the appellate process has an especial potential for corrupting the death sentencing process. Comments about appellate safeguards on the death penalty suggest to the jury that it can pass the responsibility for the death sentence on to an appellate court. United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962). The fact that such a statement is made by the trial court as distinguished from the prosecutor lends additional weight to such a statement in view of the unique position occupied by the trial judge in a court proceeding. A statement by the court has even more of a tendency to cause the jurors to relax the caution and deliberation necessary for their determination.

In United States v. Fiorito, 300 F.2d 424 (7th Cir. 1962), the trial judge prefaced his formal instructions to the jury with the statement that its verdict would not be the final judgment since there was a court of appeals. The Seventh Circuit reversed the conviction of the defendants, holding that the statement of the judge had the effect of depriving the defendants of protection against conviction where reasonable doubt existed and of diluting the final responsibility of the jury. Early Georgia cases that are factually similar seem to follow this same reasoning. In Monroe v. State, 5 Ga. 85 (1848), the trial court stated to the jury that there was a Supreme Court for the correction of errors and that the accused could take his case up and have any error corrected. The Georgia Supreme Court held the statement to be reversible error. *See also* Hodges v. State, 15 Ga. 117 (1854). Although a contrary result was reached in United States v. Greenberg, 445 F.2d 1158 (2d Cir. 1971), in which the Second Circuit held that it was permissible to discuss appellate procedure in instructions to the jury, the court qualified this holding by stating that it would have been "better procedure" not to have given such an instruction. 445 F.2d at 1162.

This court is cognizant of the trial judge's hesitancy to answer the questions posed by the jury during the sentencing phase of petitioner's trial. However, *any* comment regarding the right of direct appeal has the inevitable effect of encouraging the jurors to attach diminished consequence to their verdict and to take less than full responsibility for their awesome task of determining life or death. If the jury is exposed to comments regarding appellate safeguards on the death penalty, the trial court

should explain to the jurors that it is their sole responsibility to decide whether the defendant will be executed and that they cannot pass that responsibility on to anyone else. In the instant case, this court is of the opinion that the statement informing the jury of a mandatory appeal from a death sentence had a great impact in influencing its decision. As a result, the sentencing procedure violated the petitioner's constitutional rights.

Accordingly, the petitioner's petition for a writ of habeas corpus will be granted if, after ninety days, the state fails to properly resentence the petitioner in accordance with this order. All other the aspects of the magistrate's report and recommendation not specifically discussed herein are hereby adopted with approval as the opinion and order of this court.

SO ORDERED, this 30th day of June, 1981.

/s/ Robert L. Vining, Jr.
United States District Judge

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7649

CHARLES THOMAS CORN,

Petitioner-Appellee,
Cross - Appellant,

versus

WALTER ZANT, Warden, Jackson
Diagnostic and Classification Center,

Respondent-Appellant,
Cross - Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

(June 15, 1983)

Before HILL and HENDERSON, Circuit Judges, and GARZA*, Senior Circuit Judge

HENDERSON, Circuit Judge:

The petitioner-appellee, Charles Thomas Corn, filed a writ of habeas corpus pursuant to the provisions of 28 U.S.C. § 2254 (1976) seeking to overturn his conviction and death sentence for murder and his conviction for armed robbery in the Superior Court of Clayton County, Georgia. He alleged twenty-one grounds for relief in the district court, although some of these issues were not raised in the state trial or habeas corpus court. However, by supplemental brief to this court, the state has expressly waived the exhaustion requirement. *See Lamb v. Jernigan*, 683

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*Honorable Reynaldo G. Garza, U.S. Circuit judge for the Fifth Circuit, sitting by designation.

F.2d 1332, 1335 n. 1 (11th Cir. 1982), *cert. denied,* — U.S. —, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983). Of the perceived twenty-one errors asserted in the federal district court, all but one were rejected by that court. The district court did find merit in Corn's challenge to the sentencing procedure in the state trial court, and granted his application for a writ of habeas corpus. The respondent in the state and federal habeas proceedings, Walter Zant, appeals the grant of the writ and Corn cross-appeals the denial of his other grounds of relief.

Charles Thomas Corn was convicted of murdering a "Stop and Go" convenience store employee and stealing $47.00 from the cash register in Clayton County, Georgia in 1975. The shop attendant, Mary Long, was dragged into the storage area where she was stabbed to death with a steak knife. After he killed Long, and with her blood on his hands and shirt, Corn waited on customers, telling them he had been the victim of an attempted robbery. These customers subsequently identified Corn. When Corn was arrested a few days later, his wife came to the police station and asked if he had killed the woman at the Stop and Go store. He answered, "Yes, I killed the girl, but I didn't mean to."

Upon his conviction, a superior court jury sentenced him to death on May 26, 1976. On a mandatory review of the death sentence in accordance with Ga. Code. Ann. § 27-2537 (recodified as Off. Code Ga. Ann. § 17-10-35 (1982)), the Supreme Court of Georgia upheld Corn's sentence of death for murder but suspended its imposition for the armed robbery conviction. *Corn v. State,* 240 Ga. 130, 240 S.E.2d 694 (1977), *cert. denied,* 436 U.S. 914, 98 S.Ct. 2255,

56 L.Ed.2d 415 (1978). Corn then filed a petition for a writ of habeas corpus in the Superior Court of Tattnall County, Georgia. The state habeas court denied relief, which denial was subsequently affirmed by the Georgia Supreme Court. *Corn v. Hopper*, 244 Ga. 28, 257 S.E.2d 533 (1979). Corn then instituted this federal habeas corpus action in the United States District Court for the Northern District of Georgia. The application was referred to a magistrate under 28 U.S.C. § 636(b) (1) (B) (West Supp. 1983). The magistrate in turn reviewed the transcript of the state trial proceedings and conducted an evidentiary hearing on Corn's ineffective assistance of counsel claim. In an exhaustive report and recommendation to the district court, the magistrate recommended the denial of all the petitioner's claims except one — that the trial court's instructions on malice and intent impermissibly shifted the burden of proof to the defendant in violation of the due process clause of the fourteenth amendment to the United States Constitution. *Sandstrom v. Montana*, 442 U.S. 500, 99 S.Ct. 2213, 61 L.Ed.2d 39 (1979). Upon review, the district court adopted the bulk of the report and recommendation but disagreed with two of the magistrate's findings. The district judge first rejected the conclusion that the instructions on intent unconstitutionally shifted the burden of proof. However, as indicated, the district court granted the writ based on his belief that the state trial judge impermissibly disclosed to the jury that Corn had an automatic appeal of the death sentence to the Supreme Court of Georgia.

Before turning to Corn's specific allegations of error, we again emphasize that a federal court does not sit as a state appellate court to correct violations of state eviden-

tiary rules. *Bryson v. Alabama*, 634 F.2d 862 (5th Cir. 1981); *Meyer v. Estelle*, 621 F.2d 769, 771 (5th Cir. 1980); *Woods v. Estelle*, 547 F.2d 269, 271 (5th Cir.), *cert. denied*, 434 U.S. 902, 98 S.Ct. 297, 54 L.Ed.2d 188 (1977).[1] Nor is it our role to analyze every infirmity that might have been reached on direct appeal. Our inquiry is restricted to those aspects of the trial affecting the petitioner's federal constitutional rights, *see, Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974); *Passman v. Blackburn*, 652 F.2d 559, 567 (5th Cir. 1981) *cert. denied*, 455 U.S. 1022, 102 S.Ct. 1722, 72 L.Ed.2d 141 (1982); *Martin v. Wainwright*, 428 F.2d 356, 357 (5th Cir. 1970), *cert. denied*, 400 U.S. 918, 91 S.Ct. 179, 27 L.Ed.2d 157 (1970).

We address first the alleged error which led the district court to grant the writ. Corn maintains that the state trial judge improperly informed the jury of Georgia's automatic appeal rule. Ga. Code Ann. § 27-2537 (recodified as Off. Code Ga. Ann. § 17-10-35 (1982)). He says, and the district court agreed, that such a remark had the effect of diminishing the jurors' sense of responsibility in making their life or death decision at this crucial stage of the trial.[2]

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[1]In Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as precedent the decisions of the Fifth Circuit rendered prior to October 1, 1981.

[2]Corn did not object during the trial to the judge's comments. Generally, failure to object precludes subsequent consideration of an issue unless the defendant can satisfy the cause and prejudice test set forth in Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). However, as we stated in Rogers v. McMullen, 673 F.2d 1185, 1188 (11th Cir. 1982), where a state court does not rely on a procedural default in its decision, but reaches the merits of the issue, this court may review the substantive question on appeal. *See also* Thompson v. Estelle, 642 F.2d 996 (5th Cir. 1981). The Georgia courts reached this constitutional ground, and thus, we are not foreclosed from reviewing it.

This problem arose during a break in the jury's deliberations when some of the jurors questioned the trial judge about his authority to change the sentence imposed by that body. The relevant portion of the colloquy between the court and the jurors is as follows:

Juror Deaton: Yes, your Honor, if the death penalty is invoked, does that automatically mean that the defendant will be placed in the electric chair?

Court: I don't know how to answer that, except I will say this. In the event there is a death penalty, the law provides for mandatory appeal and the case must be appealed by law. And if upon affirmance by the higher court, then the matter is as it is provided by law. [sic] I hesitate to say much more to you because for fear that I may make some judicial error in the case and I can only tell you that I have already told you about as much as I can under the law. Now is there anything else bearing on your mind?

Juror Randall: One thing that has been going through our minds is if we invoke the death penalty and that specifies the electric chair, can you as the overriding judge right now say, come in and say that he is going to get the electric chair or that he can have death by prison, or life imprisonment? That he is to die in prison and never to get out?

Court: Now the —

Juror Randall: Could you yourself do that?

Court: The Court by law in this particular case fix [sic] and imposes sentence that you provide in your sentence. I cannot change your sentence.

Juror Randall: *That's what we wanted to know, if you could do that.*

Court: The only sentence that I would pass is as I told you if you find no aggravating circumstances in connection with Count 1 pertaining to armed robbery, then I would set that sentence.

Juror: Not to repeat yourself, but if we did say life imprisonment, we have no idea about parole at all, right?

Court: That's right. This is something that the Court is not authorized to comment on.

Trial Transcript at 1077-78. (Emphasis added).

The jury then retired to the jury room and shortly thereafter returned with their recommendation of the death penalty. The trial judge imposed the sentence of death as required by law. Ga. Code Ann. § 26-3102 (recodified as Off. Code Ga. Ann. § 17-10-31 (1982)).

In reviewing the denial of Corn's state habeas corpus petition, the Supreme Court of Georgia considered whether the trial judge's reference to the appellate process was so prejudicial as to necessitate granting post-conviction relief. The court affirmed the state habeas court, stating:

> Viewing the court's sentencing charge as a whole, we find that the jury was instructed to decide on their sentence from the evidence and law presented at the sentencing hearing, taking the full responsibility of

> determining life or death for the defendant. No remarks by the court could be construed as encouraging the jury to attach diminished consequences to their verdict.

*Corn v. Hopper*, 244 Ga. 28, 31, 257 S.E.2d 533, 536 (1979). We agree with the Georgia Supreme Court. The court explicity held that this determination did not conflict with its prior decisions in which the death penalty was set aside when prosecutors, in their arguments, had referred to the mandatory review procedures. In *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365, 367 (1975), the death sentence was vacated because the "inevitable effect" of the prosecutor's emphasis on the defendant's right to an automatic appeal was "to encourage the jury to attach diminished consequence to their verdict." Similarly, where the district attorney stressed to the jury that "the State executes only guilty persons after they've been tried and convicted and appealed and everything exhausted," Georgia's highest court did not hestitate to invalidate the death penalty. *Hawes v. State*, 240 Ga. 327, 240 S.E.2d 833, 839 (1977). *See also, Fleming v. State*. 240 Ga. 142, 240 S.E.2d 37 (1977) (death sentence set aside due to prosecutor's improper prediction of the consequences of the jury's verdict). However, in *Coker v. State*, 234 Ga. 555, 216 S.E.2d 782 (1975), a death sentence was affirmed when the trial judge's curative instruction alleviated the harmful effect of the prosecutor's reference to mandatory review in capital cases. In the case at bar, the district court observed that because "of the unique position occupied by the trial judge" the comments of the court at Corn's trial might have been more prejudicial than similar statements made by prosecutors in other instances.

Our problem with this reasoning is not so much the propriety of the state trial judge's statement within the framework of state trial procedure as the implication that it rises to the level of constitutional error. Here, the brief mention of the right to appellate review was not the prejudicial argument of a district attorney, but the court's misinterpretation of a question posed by one of the jurors. It is obvious that the jury was not concerned with the appellate process when it made its initial inquiry of the court. Rather, its sole interest was whether the court could legally disregard its verdict and change the recommended sentence. The trial judge, perhaps understandably, failed to recognize the import of the jury's question and inadvertently mentioned the right of automatic appellate review. Only when a jury member repeated the original question did the judge correctly respond that he could not overturn the jury's recommendation.

It is within this narrow factual setting that we address Corn's due process claims. At the outset, we note that the death sentences in *Hawes*, *Prevatte* and *Fleming* were set aside on direct appeal rather than in habeas corpus proceedings. Consequently, the Georgia court was not required to consider the constitutional impact of the alleged error but confined itself to state law resolutions. By contrast, in a federal habeas action, Corn's entitlement to relief must be predicated on due process grounds.[3] A

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[3]See Passman v. Blackburn, 652 F.2d at 567 where, in discussing the standard for reviewing prosecutorial misconduct in habeas corpus proceedings, the court stated, "Further, not every trial error or infirmity which might on direct appeal call for application of our supervisory powers correspondingly constitutes a denial of due process necessary to support granting habeas corpus relief. *Donnelly, supra*, 416 U.S., at 642-43, 94 S.Ct., at 1871; Cobb v. Wainwright, 609 F.2d 754 (5th Cir.), *cert. den.*, 447 U.S. 907, 100 S.Ct. 2991, 64 L.Ed.2d 857 (1980)."

reference to the automatic appeal of the death penalty in a different context might have resulted in fundamental unfairness. However, on these facts, viewing the judge's remark in light of the whole sentencing procedure, we conclude that Corn did not suffer any constitutional deprivation.

The jurors were obviously uncertain about the mechanics of the sentencing procedure, and the court was attempting to explain the process in which they played such a critical role. The judge did little more than reiterate parts of his earlier charge to the jury to weigh all the evidence and return a verdict on which "it would then be the duty of the Judge to sentence the Defendant . . . as provided by law." Trial Transcript at 1616. No rule requires that the jury be kept totally ignorant of the appellate process. There is no indication that mere knowledge of Corn's potential appeal diminished the jury's sense of responsibility for its sentence.

We find little federal precedent that directly bears on this issue. The decision of the United States Court of Appeals for the Second Circuit in *United States v. Greenberg*, 445 F.2d 1158 (2d Cir. 1971), a review on direct appeal of a non-capital case, espouses the same reasoning that we find persuasive in the case at bar. In *Greenberg*, the court stated,

> It might have been better procedure not to have told the jury that if they convicted upon an erroneous charge they did not 'have to worry' because this court would reverse if there were error. This might have lessened the jury's sense of responsibility but such a reaction would be unlikely.

The contrary view was expressed by the Seventh Circuit Court of Appeals in *United States v. Fiorito*, 300 F.2d 424

(7th Cir. 1962) where the court held that it was reversible error for the judge to tell the jury, "[T]hat's why we have a court of appeals, they will reverse me if I'm wrong. This is not the final judgment, there is a court of appeals to review me and a Supreme Court to review them." *Id.* at 426. Unlike this case, *Fiorito* involved the direct appeal of a federal narcotics conviction rather than a collateral attack on a state court judgment. In addition, the judge's statements in *Fiorito* were clearly aimed at lessening the significance of the jury's decision, whereas in the case at bar, the court's remarks dealt with the limited scope of the judge's own power.

Our holding today should not be broadly interpreted to apply to all such comments in other cases but, as stated earlier, is limited to the peculiar facts before us. In this particular instance, the prejudice to Corn, if any, did not reach the magnitude of a due process violation. Thus, this claimed error is no basis for habeas corpus relief.

As pointed out earlier, the magistrate in his report and recommendation found that during the guilt determination phase of Corn's trial, the jury instructions on presumption of intent impermissibly and unconstitutionally shifted the burden of proof to the defense. The critical language used by the trial court is "[t]he law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse."[4] Corn also objects to that portion of the charge that "[a] person of sound mind and discretion is presumed to intend the natural and probable

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[4]The complete quotation of this portion of the charge of the court is reproduced as Appendix "A" at the end of this opinion.

consequences of his acts" and that "[t]he law presumes every person to be sane unless it is shown to the contrary that he is insane or of unsound mind." Record, vol. 8 at 1534; 1536-37. He claims that this sanity charge, when taken in conjunction with the instruction on intent, could have caused the jury to believe that the defendant had the duty to negate the element of malice. Under Georgia law, malice, either express or implied, is an essential element of murder and must be established by the prosecution beyond a reasonable doubt. Ga. Code Ann. § 26-1101 (recodified as Off. Code Ga. Ann. § 16-5-1 (1982)); *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976).

In examining the instructions for possible constitutional infirmity, we must determine whether a reasonable jury might have failed to understand, from the entire charge, that there was a rebuttable presumption of intent or malice and that they were free to weigh all the evidence. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2213, 61 L.Ed.2d 39 (1979). This court has recently addressed the constitutionality of purported burden-shifting jury instructions. *See Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982), *cert denied*, 51 U.S.L.W. 3750 (U.S. April 19, 1983) (No. 81-7132); *Lamb v. Jernigan*, 683 F.2d 1332 (11th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 1276, 75 L.Ed.2d 496 (1983); *Hearn v. James*, 677 F.2d 841 (11th Cir. 1982); *Mason v. Balkcom*, 669 F.2d 222 (5th Cir. Unit B 1982) *cert. denied*, —— U.S. ——, 103 S.Ct. 1260, 75 L.Ed.2d 487 (1983).[5] While the analysis in these opin-

[5]*Mason v. Balkcom* is binding on the Eleventh Circuit as a post-September 30, 1981 decision of a Unit B panel of the Former Fifth Circuit. *See* Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

ions is helpful, the cases are not dispositive because each set of instructions differs in length and phraseology, and none is identical to the charge given at Corn's trial.

Our inquiry focuses on whether these instructions shifted the burden of proof to the petitioner on the issue of intent to kill, in violation of the due process clause of the fourteenth amendment. *Mason*, 669 F.2d at 225. Under this test, the court does not scrutinize discrete portions of the charge but must evaluate it in its entirety:

> It is well established that '[i]n determining the effect of [an] instruction on the validity of [a] conviction, . . . a single instruction may not be judged in artificial isolation, but must be viewed in the context of the overall charge.' *Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973). '[T]he question is not whether the trial court failed to isolate and cure a particular ailing instruction, but rather whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process.' *Id.* at 147, 94 S.Ct. at 400. *Accord Henderson v. Kibbe*, 431 U.S. 145, 154, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977). The approach mandated by the above cases requires courts to consider the effect even of patently erroneous instructions in light of the remainder of the charge and the entire trial.

*Lamb*, 683 F.2d at 1339.

In light of the overall charge of the court, we do not believe that the burden of proof was shifted to Corn to demonstrate a lack of malice. The instructions found to be unconstitutionally burden-shifting in *Sandstrom* contained no curative language to the effect that the presumption of

intent could be rebutted.[6] The charge in this case, however, unequivocally stated "but this presumption may be rebutted," and "[a] person will not be presumed to act with criminal intention." Record, vol. 8 at 1535. Moreover, the instructions were clear that the accused "may" show circumstances to negate intent, "[b]ut he is not required to do so", and that he "may" show that the killing was done without malice, "[b]ut he is not required to do so." Record, vol. 8 at 1533. The charge is replete with cautious explanations that refute Corn's claim that an irrebuttable presumption weighed against him. By way of example the court stated "[i]f such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist." The instruction continued, "this presumption . . . does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt the defendant was the intentional slayer." Record, vol. 8 at 1533. In contrast, the charge in *Lamb* contained the damaging phrase, "[t]he law presumes that every homicide is malicious until the contrary appears from circumstances . . . *and it is incumbant* [sic] *upon the accused to make out such circumstances to your satisfaction . . .*" *Lamb*, 683 F.2d at 1337 n. 8 (emphasis added). There was no comparable language in this case to suggest a shift in the burden of

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[6]The Supreme Court specifically noted that the jurors in *Sandstrom* "were not told that the presumption could be rebutted . . . by the defendant's simple presentation of 'some' evidence; nor even that it could be rebutted at all." 442 U.S. at 517, 99 S.Ct. at 2455, 61 L.Ed.2d at 46.

proof to Corn. At most, there was a permissible inference[7] that the defendant *could*, if he so chose, introduce mitigating evidence.[8] The United States Supreme Court has recognized that "[i]nferences and presumptions are a staple of our adversary system of factfinding." *County Court of Ulster v. Allen*, 442 U.S. 140, 156, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777, 791 (1979). The "ultimate test" in determining whether a presumption in a criminal case is valid under the due process clause of the fourteenth amendment is that "the device must not undermine the factfinder's responsibility at trial, based on the evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt." *Id.* The instructions in this case were fair and balanced in both tone and content. Whatever untoward effect any part of the instruction may have had was entirely vitiated by the clear statement of the state's responsibility to prove intent beyond a reasonable doubt.

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[7]This conclusion is consistent with the Supreme Court of Georgia's characterization of a similar instruction. That court, at the request of the United States Supreme Court, reconsidered an analogous jury charge and held that such instructions, "taken together, created merely a permissive presumption of the type considered in County Court of Ulster v. Allen, 60 L.Ed.2d 777 (1979)," and not a mandatory and unconstitutional presumption. Whisenhunt v. State, 152 Ga. App. 829, 264 S.E.2d 271 (1979) *cert. denied*, 449 U.S. 886, 101 S.Ct. 241, 66 L.Ed.2d 112 (1980). *Accord* Huffman v. State, 153 Ga.App. 203, 265 S.E.2d 603 (1980); Skrine v. State, 244 Ga. 520, 260 S.E.2d 900 (1979).

[8]As we stated in *Lamb*, "[t]he Supren Court has recognized that inferences that operate to shift only a low burden of production — and not the burden of persuasion — to the defendant are constitutionally acceptable if there is a rational connection between the inference and the underlying facts. *See* Ulster County Court v. Allen, 442 U.S. at 157 n. 16, 99 S.Ct. at 2225 n. 16; Mullaney v. Wilbur, 421 U.S. at 701-02 & nn. 28, 30-31, 95 S.Ct. at 1891 & nn. 28, 30, 31." *Lamb*, 683 F.2d at 1338 n. 9. *See also*, Hammontree v. Phelps, 605 F.2d 1371 (5th Cir. 1979).

The Constitution guarantees each defendant a fundamentally fair trial, not a perfect one. The charge as a whole did not impermissibly shift the burden of proof to Corn in violation of his due process rights.

Corn next urges that he was denied effective assistance of counsel in that (1) the trial court refused to provide transcripts and additional funds for his defense and (2) his trial counsel furnished ineffective representation. The magistrate conducted an evidentiary hearing, Record, vol. 10, and found that Corn was not deprived of his sixth amendment right to effective counsel, which finding was adopted by the district court.

Neither the court's refusal to provide transcripts nor counsel's failure to order a record of the opening and closing remarks at the trial deprived Corn of effective assistance. There is no statutory duty to transcribe those statements. Under Ga. Code. Ann. § 27-2401, (recodified as Off. Code Ga. Ann. § 17-8-5 (1982)), the court reporter records the entire trial "except the argument of counsel." Corn contends, however, that the Supreme Court of Georgia could not properly assess the fairness of his death sentence without considering the opening and closing remarks. The court reviewed the record and determined that the death penalty was not imposed under the influence of "passion, prejudice or any other arbitrary factor." *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977), *cert. denied*, 436 U.S. 914, 98 S.Ct. 2255, 56 L.Ed.2d 415 (1978); Ga. Code Ann. §§ 27-2537(a) - (a)(1) (recodified as Off. Code Ga. Ann. § 17-10-35(c)(1) (1982)). The appellant insists though, that there is no greater opportunity for prejudice than in the arguments of counsel, and that the failure to preserve that part of the proceedings

was error of a constitutional magnitude. He did not, however, object to any part of the opening or closing statements, nor does he point to any infirmities during those phases of the trial. Absent any showing of harm by a petitioner, it is settled that failure to transcribe counsel's arguments is not a constitutional violation requiring vacation of a death sentence. *Stephens v. Zant*, 631 F.2d 397, 402-04 (5th Cir. 1980), *reh. denied and modified*, 648 F.2d 446 (1981), *certified to the Supreme Court of Georgia on other grounds*, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).

Corn also alleges that because of his indigency he was deprived of the opportunity for a fair hearing in that he could not afford the cost of transcribing the opening and closing remarks. However, as the magistrate correctly observed, there is no indication that the transcription would have been denied, despite Corn's lack of funds, if he had but asked for it. Since Corn did not make such a demand, there is no error in the failure to transcribe. *See Lyle v. State*, 131 Ga. App. 8, 205 S.E.2d 126 (1974); *Ellis v. State*, 137 Ga. App. 834, 224 S.E.2d 799 (1976).

The other contentions concerning ineffective assistance of counsel are equally without merit. The appropriate inquiry is whether the petitioner was represented by counsel reasonably likely to render and in fact rendered reasonably effective assistance. *United States v. Phillips*, 664 F.2d 971, 1040 (11th Cir. 1981), *cert. denied*, — U.S. —, 103 S.Ct. 208, — L.Ed.2d — (1983). *Accord, Kemp v. Leggett*, 635 F.2d 453 (5th Cir. 1981); *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974); *quoting MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir.), *cert. denied*, 368 U.S. 877

(1960).[9] Rather than taking isolated instances out of context, we determine whether effective service was rendered based on the totality of the circumstances. *United States v. Gibbs*, 662 F.2d 728 (11th Cir. 1981). Corn complains that his attorney failed to pursue certain defenses, file additional motions, and make specific objections. However, such matters of trial strategy are, of necessity, the decisions of the attorney, and the sixth amendment right to reasonably effective counsel does not mean errorless assistance or counsel judged ineffective by hindsight. *Ford v. Strickland*, 696 F.2d 804 (11th Cir. 1983) (en banc); *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *petition for cert. filed*, 51 U.S.L.W. 3831 (U.S. May 17, 1983) (No. 82-1554).

Corn's counsel cannot be castigated, for example, for failing to pursue a "delusional compulsion" defense instead of a "right/wrong" insanity defense when the defendant insisted that he remembered absolutely nothing about the murder. It would have been difficult, at best, for his lawyer to have shown that Corn was suffering from a certain delusion when the defendant could not even recall the chain of events.

Moreover, to warrant the grant of habeas corpus, Corn would have to prove that the assistance, even if ineffective, "created not only a *possibility* of prejudice, but that '[it]

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[9]As the district court noted, when a general due process claim is raised under the fourteenth amendment, the test for constitutionally ineffective assistance of counsel is whether the whole proceeding was "fundamentally unfair." Nelson v. Estelle, 642 F.2d 903, 907-08 (5th Cir. 1981); Hills v. Henderson, 529 F.2d 397, 401 and n. 8 (5th Cir.), *cert. denied sub nom.* Hills v. Maggio, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976).

worked to his *actual* and substantial disadvantage.'" *Washington v. Strickland*, 693 F.2d at 1258, *quoting United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 1596, 71 L.Ed. 2d 816 (1982) (emphasis in original). As stated in *Adams v. Balkcom*, 688 F.2d 734 (11th Cir. 1982), "'prejudice' does not embrace errors which are merely detrimental to appellant's case." *Id.* at 739, *citing Washington v. Watkins*, 655 F.2d 1346, 1360 (5th Cir. 1981) *cert. denied*, — U.S. —, 102 S.Ct. 2021, — L.Ed.2d — (1982).

In summary, we find that Corn's trial counsel made strategic decisions reasonably calculated to afford effective representation, and Corn has not shown that those choices so prejudiced him as to violate any constitutionally protected right. Therefore, we agree with the district court that Corn's attorney was "capable of rendering and actually did render reasonably effective assistance, based on the totality of the circumstances." *Phillips*, 664 F.2d at 1040; *Nelson v. Estelle*, 642 F.2d 903 (5th Cir. 1981).

Corn also claims that his sentence was determined in an arbitrary and capricious manner and in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed. 2d 398 (1980). In *Godfrey*, the United States Supreme Court construed one of the statutory aggravating circumstances, Ga. Code. Ann. § 27-2534.1(b)(7),[10] and stated

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[10]Ga. Code Ann. § 27-2534.1(b)(7) (recodified as Off. Code Ga. Ann § 17-10-30(b)(7) (1982)) states in pertinent part:

> In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory

(Continued on following page)

that the death penalty for murder cannot be imposed absent specific findings of torture, depravity of mind, or aggravated battery to the victim. *Id.*, 446 U.S. at 431-32, 100 S.Ct. at 1766-67, 64 L.Ed.2d at 408-09. In Corn's case, the jury was instructed that it must find statutory aggravating circumstances as a prerequisite to imposing a death sentence.[11] The jury did find that there was aggravated battery to the victim, defined as when "[a] person . . . maliciously causes bodily harm to another by depriving him of a member of his body, or by rendering a member of his body useless, or by seriously disfiguring his body or a member thereof." Ga.Code. Ann. § 26-1305 (revised and recodified as Off. Code Ga. Ann. § 16-5-24 (1982)). This victim's nose and ear cartilage were severed, her face was cut, and four of the many stab wounds punctured her chest and back muscles, reaching her heart. A doctor testified that she must have died from those wounds in three to fifteen minutes, thus suffering the pain and disfigurement before dying. Corn claims that these facts cannot support a section (b)(7) charge because any one of the stab wounds could have been fatal, and thus the victim was not "in too much pain for very long." Such

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(Continued from previous page)

> aggravating circumstances which may be supported by the evidence: . . . (7) the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.

[11]Corn's death sentence was based on a finding of three statutory aggravating circumstances, Ga. Code Ann. § 27-2534.1 (b)(2); 27-2534(b)(4); and 27-2534.1(b)(7) (recodified as Off. Code. Ga. Ann. § 17-10-30(b)(2)(4)(7) (1982)). On this appeal, he challenges only the § (b)(7) charge.

an argument is clearly spurious. The sordid evidence of the victim's injury and subsequent death more than justifies an instruction on this aggravating circumstance.

Corn also alleges that the trial court erred in not clearly instructing the jury during the sentencing phase that even if aggravating circumstances were present, the jury could impose life imprisonment instead of death. A reading of the charge itself refutes this contention. After instructing the jury on statutory aggravating circumstances, the court stated, "[i]f you do not find that at least one of the statutory aggravating circumstances existed, *or if you so fina but do not determine to impose the death penalty*, the form of your verdict shall be: We, the jury, fix punishment of the Defendant at life imprisonment as to Count Number Two Murder . . ." Record, vol. 9 at 1616 (emphasis added).[12] This ground of error apparently evolves from recent cases which hold that charges

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[12]The charge, when read as a whole, would make it unmistakably clear to the jurors that they have the option to impose a sentence of either death or life imprisonment. Other portions of the court's charge reinforces this conclusion:

> You are authorized to consider all of the facts and circumstances, if you find any, *in extenuation and mitigation* of punishment . . . Under the law of this State, every person found guilty of the offense of murder shall be punished by death by electrocution *or by imprisonment for life* in the State Penitentiary.
>
> . . .
>
> If you find from the evidence that there were *no statutory aggravating circumstances* which you are authorized to consider, this would end your deliberation on the death penalty and *you should then return your verdict for life imprisonment* . . .

Record, vol. 9 at 1613-15 (emphasis added).

which do not explicitly instruct the jury of its option to recommend against death are unconstitutionally deficient. *Goodwin v. Balkcom*, 684 F.2d 794 (11th Cir. 1982) *cert. denied*, 51 U.S.L.W. 3750 (U.S. April 19, 1983) (No. 81-7132); *Spivey v. Zant*, 661 F.2d 464 (5th Cir. Unit B 1981), *cert. denied*, — U.S. —, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982). *See also, Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion requiring instructions to focus jury's attention on consideration of mitigating circumstances and the alternative of recommending a life sentence even if aggravating circumstances are found). The charge in *Goodwin*, like that in *Spivey*, was insufficient because it did not "even slightly hint about the option to impose life imprisonment even though aggravating circumstances are found." *Goodwin*, 684 F.2d at 802. The instructions here, however, contain adequate guidelines to lead a reasonable juror to fully comprehend the duties and choices involved in the sentencing procedure. We agree with the district court that the sentencing instructions were not constitutionally infirm.

Petitioner next contends that the Georgia statutory provisions and practices governing appellate review of the death sentence violated his sixth and fourteenth amendment rights, and he refers specifically again to the lack of a copy of the opening and closing arguments. As we have stated, the failure to transcribe the statements did not prevent Corn from obtaining a fair review of his trial, nor did it constitute ineffective assistance of counsel. Furthermore, Corn's broadside attack on Georgia's death penalty statute is patently without merit, for the United States Supreme Court has already declared the statute to

be constitutional, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

In a related argument, Corn claims that the imposition and execution of his death sentence violates the eighth and fourteenth amendments for four reasons: (1.) the death penalty is administered arbitrarily and capriciously; (2.) there is no justification for capital punishment; (3.) the death penalty violates contemporary standards; and (4.) the method of inflicting death is wanton and unnecessarily cruel. As the magistrate and district court correctly stated, these identical issues were decided adversely to the petitioner in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *See also, Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977).

Corn also asserts that his sentence is cruel and unusual because administration of the death penalty is often based on a prisoner's race, sex and economic status. In a habeas corpus context, a petitioner bears the burden of producing substantive evidence to support such a claim. *See generally, Smith v. Balkcom*, 660 F.2d 573 (1981), *modified* 671 F.2d 858, 859-60 (5th Cir. Unit B 1982), *stay granted pending application to the Supreme Court*, 677 F.2d 20 (5th Cir. Unit B), *cert. denied*, — U.S. — , 103 S.Ct. 181, 74 L.Ed.2d 148 (1982). Because Corn has not pointed to any acts evidencing intentional discrimination on the basis of sex or wealth, we are without a basis to evaluate his complaint. *Id.*, 660 F.2d at 585; *Spinkellink v. Wainwright*, 578 F.2d 582, 614 n. 40 (5th Cir. 1978) *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). As was stated in *Spinkellink*, "a state, if it chooses, can punish murderers and seek to protect its citizenry by imposing the death penalty — so long as it does so through a statute

with appropriate standards to guide discretion." *Id.*, 578 F.2d at 605. We reiterate that the constitutionality of the Georgia statute was upheld by the United States Supreme Court in *Gregg*. The sentencing guidelines are therefore adequate. Without substantiating evidence, the petitioner's bare allegation of discrimination must fail.

Corn further alleges that the state did not introduce sufficient evidence to rebut his showing that he was legally insane at the time of the murder. Additionally, he argues that the test for insanity, as applied to him, violated the equal protection and due process clauses of the fourteenth amendment. He reasons that even though the evidence of his insanity was sufficient to satisfy the test as codified in Georgia, it would not have supported a finding of sanity under the Model Penal Code test, and thus, it was deficient.

This argument amounts to little more than Corn's mere speculation that he might not have been convicted in some other jurisdiction where the insanity test differs from that in Georgia. Each state has a substantial interest in formulating and enforcing its own laws, and the fact that Georgia has not adopted the Model Penal Code is no cause to overturn Corn's conviction.

The Georgia code provides two tests for insanity in criminal cases, the *M'Naghten* test[13] and the delusional

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[13]Ga. Code Ann. § 26-702 (revised and recodified as Off. Code Ga. Ann. § 16-3-2 (1982)) provides:

> A person shall not be found guilty of a crime if at the time of the act, omission, or negligence constituting the crime,

(Continued on following page)

compulsion defense.[14] Corn's attorney relied solely on the right/wrong, or *M'Naghten*, defense. He made that strategy decision because Corn was unable to describe any delusion that afflicted him at the time of the murder. Indeed, Corn said he recalled nothing at all about the death of Mary Long. Thus, because no evidence was offered to satisfy the delusional compulsion test, the court properly addressed only the *M'Naghten* Rule. It was not constitutional error to rely on this particular insanity defense under Georgia law.

Having determined that the court applied the correct test, we turn to Corn's challenge of the sufficiency of the state's evidence of his sanity. Both Corn's wife and mother-in-law testified that he knew right from wrong. Dr. William P. Sapp, who was a defense witness, stated that

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(Continued from previous page)

> the person did not have mental capacity to distinguish between right and wrong in relation to such act, omission, or negligence.

This section codifies the rule expressed in *M'Naghten's Case*, 8 Eng. Rep. 718 (1843). The Supreme Court of Georgia specifically declined to abandon the *M'Naghten* Rule in Moody v. State, 244 Ga. 247, 260 S.E.2d 11 (1979), stating that it was "for the legislature to say whether the *McNaughton* [sic] Rule should be replaced by the A.L.I. test of mental incompetence in the trial of criminal cases." *Id.* at 15. The legislature has not repealed the old rule.

[14]Ga. Code Ann. § 26-703 (revised and recodified as Off. Code Ga. Ann. § 16-3-3 (1982)) provides:

> A person shall not be found guilty of a crime when, at the time of the act, omission, or negligence constituting the crime, the person, because of mental disease, injury, or congenital deficiency, acted as he did because of a delusional compulsion as to such act which overmastered his will to resist committing the crime.

Corn suffered from seizures and dysfunction of the brain, (Record, vol. 8 at 1408), but Dr. Miguel Bosch, a witness for the state, testified that he did not detect any autism or signs of psychosis. (Record, vol. 8 at 1453-58). Bosch also concluded that it was difficult, if not impossible, for anyone to determine whether Corn had been sane at the time of the murder because he was not questioned until several days later. It was the jury's task to weigh and determine the relative merits of the testimony and to judge the witnesses' credibility. The jury found the testimony of Mrs. Corn and Dr. Bosch to be more credible. *See United States v. Poolaw*, 588 F.2d 103 (5th Cir.), *cert. denied*, 440 U.S. 966, 99 S.Ct. 1517, 59 L.Ed.2d 782 (1979). There is sufficient evidence to sustain the jury's verdict that the state proved beyond a reasonable doubt that Charles Corn was sane at the time of the murder and at the trial. *See Hance v. Zant*, 696 F.2d 940, 948-49 (11th Cir. 1983).

With respect to the issue of his sanity, Corn also claims that he was denied his constitutional rights when the court refused to grant his motion for an independent psychiatric examination. The history of Corn's psychiatric examination is extensively discussed in the magistrate's report. Record, vol. 2 at 355. After his arrest, Corn's counsel requested that Corn be evaluated at Central State Hospital. Corn was treated there by Dr. Bosch, a psychiatrist, for fifty-six days. He was then granted a continuance of his trial so that he could gather further psychiatric evidence. He was examined by Dr. Sapp, a psychiatrist, and Dr. Butcher, a psychologist. After Corn entered a special plea of insanity, the trial court required a fourth psychological evaluation at state expense. Following a

special hearing on his sanity, Corn was found sane. The state has fulfilled any duty that it might have had to provide him with an adequate psychiatric evaluation.

Additionally, Corn raises several issues involving the selection of the jury. Specifically, he claims that his sentence is unconstitutional because the exclusion of jurors opposed to the death penalty denied him the right to be tried by a fair and impartial jury. He also asserts that the failure to disqualify jurors who might have been predisposed in favor of capital punishment violated his due process and equal protection rights. A potential juror can be excused if he or she is irrevocably committed to vote against the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). During voir dire, venireman Vicky White was asked: "[R]egardless of what the evidence is and regardless of what the law is, on that point, you don't think you could impose the death penalty?" She replied, "no." When further pressed, "Under any circumstances," she answered "no." If her answer had been tentative or equivocal, there would not have been a sufficient basis to exclude her for cause. *Maxwell v. Bishop* 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 (1970). White's responses, however, were firmly and definitely negative. Taken as a whole, her answers support the trial court's finding that she would automatically vote against the death penalty, and thus, it was proper to exclude her under *Witherspoon*.

Corn maintains that the exclusion of jurors who oppose the death penalty denied him the right to a jury selected from a representative cross-section of the community. In *Spinkellink*, 578 F.2d at 597-98, this court addressed

questions pertaining to death-scrupled jurors, and held that when veniremen are properly struck under *Witherspoon*, their exclusion does not violate the representative cross-section requirement of the sixth and fourteenth amendments.

As a corollary to the above argument, Corn contends that the exclusion of death-scrupled jurors results in a "prosecution-prone" jury. Therefore, he reasons, his conviction violated his sixth and fourteenth amendment rights in that the jury was unrepresentative and biased on the issue of guilt. This court recently rejected a similar argument in *Smith v. Balkcom*, 660 F.2d at 576-78. *Accord*, *Spinkellink*, 578 F.2d at 594-95. Other courts have also refused to accept the notion that the remaining jurors, after the exclusion of veniremen opposed to capital punishment, are possessed of a prosecutorial bent and are not impartial. *See Bumper v. North Carolina*, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States ex rel. Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976) *cert. denied*, 429 U.S. 1064, 97 S.Ct. 791, 50 L.Ed.2d 781 (1977); *United States v. Marshall*, 471 F.2d 1051 (D.C. Cir. 1972); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977). As we said in *Smith v. Balkcom*, 660 F.2d at 578, "[a]ll veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to *either* side of the case." (original emphasis.) The record does not reveal that any jurors in Corn's case were so biased in favor of the death penalty that they would have imposed it without reasonably weighing and considering the evidence. We concur with the district court's conclusion that the veniremen indicated that they were prepared to perform their civic obligations and that they would obey the

law. Such an attitude cannot be labeled as a "hanging jury" mentality. *See Spinkellink*, 578 F.2d at 594-95.

Corn contends next that the police fraudulently induced his wife to waive her interspousal privilege and her fourth amendment right to be free from unreasonable search and seizure. Thus, he alleges, the trial court erred in admitting any evidence furnished by her. Corn's wife aided police in a search which yielded a knife and some bloody clothing. She also testified at the trial. Nothing in the record suggests that police coerced her assistance. Her cooperation was apparently voluntary.

Corn had no standing to exclude his wife's testimony at the trial because the privilege against spousal testimony is available only to the witness-spouse. Ga. Code Ann. § 38-1604 (recodified as Off. Code Ga. Ann. § 24-9-23 (1982)); *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980). Corn's wife could neither be compelled to testify nor foreclosed from doing so, and since she voluntarily took the stand, Corn cannot successfully attack the admissibility of this evidence. The trial court is afforded broad discretion in this area and its determination will not be disturbed absent a clear showing of abuse. *United States v. Dothard*, 666 F.2d 498 (11th Cir. 1982). There was no such abuse of discretion in this case.

A serologist testified at the trial that she analyzed a sample of Corn's blood and matched his blood type and that of the victim with stains found on the murder weapon, a rag and Corn's clothing. Corn argues that his fourth and fourteenth amendment rights were violated because his blood was seized in a warrantless search without his voluntary consent. He failed to object initially to the admis-

sion of the serologist's testimony and would ordinarily be precluded from raising this objection on review. *See* note 2, *infra*. Nonetheless, the state habeas corpus court and the federal district court considered the merits of the alleged error and rejected it. *Corn v. Hopper,* 244 Ga. 28, 257 S.E.2d 533 (1979); District Court's Order, Record, vol. 2 at 424-25, adopting the Magistrate's report and recommendation. Corn suffered no constitutional deprivation as a result of the blood test. The record indicates that the police informed Corn that a sample of his blood was needed as evidence. Corn willingly agreed to go to the hospital for the purpose of taking the blood specimen, and although he balked momentarily at the prospect of being injected with a needle, he voluntarily consented to the procedure.[15]

Moreover, as the magistrate concluded, the admission of this evidence, even if erroneous, was clearly harmless because it had no impact on Corn's defense. Having confessed to the killing, his only defense was insanity. The evidence of Corn's guilt was overwhelming, and he did not suffer any harm of constitutional proportion because of the serologist's testimony.

The introduction into evidence of an improperly obtained eyewitness identification is another of Corn's claims of constitutional error. At the trial, witness Billy Sweatman identified Corn after having previously recognized him at the police station at a time when Corn was without counsel. The record is not clear that Corn had actually

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[15]Record, vol. 6 at 630.

been arrested prior to the identification,[16] and thus, the proceedings were not necessarily at a critical stage when Corn would have a right to counsel. *Estelle v. Smith*, 451 U.S. 454, 469, 101 S.Ct. 1866, 1876, 68 L.Ed.2d 359, 373 (1981); *Kirby v. Illinois*, 406 U.S. 582, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972); *Moore v. Illinois*, 434 U.S. 220, 228, 98 S.Ct. 458, 464, 54 L.Ed.2d 424, 433 (1977). Indeed, in his reply brief to this court, Corn does not claim that the identification was inadmissible because his sixth amendment right to counsel was violated.[17] He simply urges that the lineup was impermissibly suggestive. When an identifica-

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[16]It appears that the "lineup" identification of Corn occurred close to the moment of arrest, when Sweatman saw Corn walking in the station with a group of four or five men, two or three of whom were policemen. Corn was arrested at the Clayton County police station approximately four hours after his initial detention, roughly the same time that Sweatman was in the station. For police testimony as to the timing of the arrest, see Record, Vol. 6 at 997-999; 1009. For Sweatman's testimony, see Record Vol. 5 at 560-71.

[17]It was the magistrate who stated in his report and recommendation that the initial identification procedure was impermissibly suggestive due to the absence of counsel. Corn's right to counsel had attached, according to the magistrate, because the police had already narrowed the focus of their investigation to Corn. The report cites United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967); *see also*, Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967) (companion case). *Wade* clearly involved a critical stage, a post-indictment lineup, but that reasoning would not necessarily affect Corn's case. The definition of a critical stage was clarified in Kirby v. Illinois, 406 U.S. 682, 32 L.Ed.2d 411, 92 S.Ct. 1877 (1972) where the plurality opinion made clear that the right to counsel as announced in *Wade* and *Gilbert* attaches only to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." Moore v. Illinois, 434 U.S. at 226, 98 S.Ct. at 463, 54 L.Ed.2d at 432.

tion is challenged on other than sixth amendment grounds, the appropriate analysis emerges from the "fifth and fourteenth amendments' proscription against procedures which are unnecessarily suggestive and conducive to irreparable mistaken identification." *Passman*, 652 F.2d at 566, *citing Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed. 2d 140 (1977).

If clear and convincing evidence demonstrates an independent origin for the witness's identification, the testimony is admissible. *United States v. Wade*, 388 U.S. at 241, 87 S.Ct. at 1926, 18 L.Ed.2d at 1149. Quoting *Wade*, the Court in *Moore v. Illinois*, 434 U.S. at 226 n. 2, 98 S.Ct. at 463 n. 2, 54 L.Ed.2d at 432 n. 2 stated:

> Among the factors to be considered in making this determination are "the prior opportunity to observe the alleged criminal act, the existence of any discrepancy between any pre-lineup description and the defendant's actual description, any identification prior to lineup of another person, the identification by picture of the defendant prior to the lineup, failure to identify the defendant on a prior occasion, and the lapse of time between the alleged act and the lineup identification.

Billy Sweatman's identification of Corn at the trial was independent of the lineup evidence. Shortly before Mary Long's corpse was discovered, Sweatman had been shopping in the convenience store and had observed Corn there for approximately ten minutes. Corn waited on Sweatman, told the youth that someone had robbed the store, and failed to charge Sweatman for his purchase. Doubtless this experience made a sufficient impression on Sweatman for him to recognize Corn just one week later. Furthermore, Corn was independently identified in court by five other

witnesses who gave the same general description of him and placed him at the scene of the killing. No objection was made to the identification at the trial.

This circuit has stated that the key factor in assessing the admissibility of identification testimony is the reliability of the identification in light of all the circumstances. *Nettles v. Wainwright*, 677 F.2d 410 (11th Cir. 1982). Considering the totality of the evidence in this case, it is clear that there was no likelihood or irreparable misidentification, and the eyewitness identification testimony was properly admitted.

The petitioner also attacks the introduction of his confession at the trial as unconstitutional because his detention was unreasonable and his incriminating statements were not knowingly and voluntarily made. Approximately four hours elapsed from the moment of Corn's first contact with police officers until his confession. Corn claims that he does not clearly remember waiving his rights, but the testimony of police officers discloses that prior to any questioning, Corn was advised of his rights, which he voluntarily waived in writing. Record, vol. 7 at 1277-78, 1295-96; vol. 8 at 1492; *see Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). This case is not one where the defendant's will was worn down over a long period of time, nor was Corn physically abused. There is no evidence that his detention was unreasonable, and there was no violation of his fourth amendment rights. *United States v. White*, 493 F.2d 3 (5th Cir.), *cert. denied* 419 U.S. 901, 95 S.Ct. 185, 42 L.Ed.2d 147 (1974).

Even though Corn's statements to the police comported with the standards of *Miranda*, the question re-

mains whether Corn's low IQ and history of emotional problems had such an impact on his confession as to render it involuntary. While it is true that statements or confessions made during a time of mental incompetency or insanity are involuntary and hence inadmissible, mere emotionalism and confusion do not necessarily invalidate them. *Sullivan v. Alabama*, 666 F.2d 478 (11th Cir. 1982). The record indicates that Corn remained calm and responsive throughout the interrogation, but was a bit shaken while his wife was present. Record, vol. 7 at 1319-20. He did not appear to be confused or incompetent so as to call into question the voluntariness of his confession. Although Corn was of below-average intelligence, he admitted that he was familiar with the criminal process and he understood the policemen's statements to him. His mental capacity was also evaluated at a hearing held pursuant to the rule in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), and the court determined that he understood his rights. Record, vol. 7 at 1310; *see United States v. Bush*, 466 F.2d 236 (5th Cir. 1972). The voluntariness of a confession is premised on the totality of the circumstances, *Sullivan*, 666 F.2d at 482-83, and based on that standard, we agree that Corn's inculpatory statement was voluntary and properly admissible into evidence.

Although he did not object at the trial, Corn later challenged the admission into evidence of the testimony of the victim's mother and the identification of the victim's son at the sentencing hearing. He claims that such evidence was not probative of circumstances in extenuation, mitigation, or aggravation of the crime, but only served to inflame the jury. The trial court has broad discretion in

passing on the admissibility of evidence, including testimony that may be calculated to create prejudice against or sympathy for the accused. It is for the trial court to determine whether the probative value of the evidence is outweighed by possible prejudicial impact. In evaluating this charge of error, the state habeas corpus court found, and we agree, that the evidence was neither inflammatory nor prejudicial. The mother testified briefly and unemotionally as to her deceased daughter's age, employment and marital status. She also identified the child, who was a spectator in the courtroom. *United States v. Sonntag*, 684 F.2d 781 (11th Cir. 1982). The trial court did not abuse its discretion by admitting this evidence.

Corn also contends that the district court erred by not granting a new evidentiary hearing. The petitioner has already had a full and fair federal evidentiary hearing on all the claims in his habeas corpus petition that bear on ineffective assistance of counsel. There are no questions of fact pertaining to any of his other allegations that would require further development. Consequently, we see no reason for an additional evidentiary hearing.

For the foregoing reasons, we AFFIRM in part and REVERSE in part and REMAND to the district court with direction to vacate the stay of execution.

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## APPENDIX

The complete instructions on intent given at Corn's trial are set forth below.

> Now as I have stated, the other offense charged against the Defendant in Count Number Two of this

bill of indictment is that of murder. And in that connection I charge you that a person commits murder when he unlawfully and with malice aforethought either express or implied causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element in murder and it must exist before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this unlawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of a slayer the moment before he inflicts the fatal wound, that is sufficient.

*The law presumes every intentional homicide to be malicious until the contrary appears from circumstances* of alleviation and justification, mitigation or excuse. The accused *may* show such circumstances to the Jury unless such circumstances appear from the evidence produced against the accused. *But he is not required to do so.* If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist. If, however, the evidence produced against the accused, if there be such, does not disclose that the killing was done without malice, the accused *may* show that it was done without malice. *But he is not required to do so.*

I charge you, however, that this presumption which arises against the slayer where an intentional homicide is shown *does not arise* against the slayer *unless* it be first shown to a moral and reasonable cer-

tainty and beyond a reasonable doubt that the Defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the Defendant himself, the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged in the indictment, the Defendant *may, but is not required to,* show mitigation or excuse.

I further charge you that it is for you, the Jury, to say whether the evidence in this case, the testimony and all of the facts and circumstances, sufficiently identify this Defendant as the slayer beyond a reasonable doubt. It is not necessary that the Defendant prove that another person committed the offense.

I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, *but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts.* If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. *However, this presumption may be rebutted. A person will not be presumed to act with criminal intention,* but the trier of the facts, and that is you, the Jury, in this case, *may find such intention* upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted.

Now, Ladies and Gentlemen of the Jury, I charge you that if you believe beyond a reasonable doubt that the Defendant did, in the County of Clayton, and State of Georgia, with a weapon described in the in-

dictment with malice aforethought either express or implied did unlawfully and intentionally stab, cut and kill the deceased as charged in the indictment and you believe the weapon as used in the manner used was likely to produce death, then you would be authorized to convict the Defendant of the offense of murder. If you have a reasonable doubt as to the Defendant's guilt as to the defense of murder, it would be your duty to acquit the Defendant of the offense of murder.

Now, as I have stated, the Defendant, Charles Thomas Corn, contends that he is not guilty of the offense as charged in this bill of indictment. He further contends that at the time of the commission of the alleged armed robbery and murder he was a person of unsound mind, that he was insane or mentally incompetent to commit the crime charged in this bill of indictment.

Our law declares that a person shall not be convicted of any crime committed while insane. Now in that connection I charge you that a person shall be considered of sound mind who is neither a lunatic nor afflicted with mental disease and who has arrived at the age of thirteen years. A lunatic person, insane or with mental disease without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the act so charged as criminal was committed in the condition of such lunacy or insanity. But if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency.

I charge you that in order to constitute a crime, a person must have intelligence and capacity enough to have criminal intent and purpose to commit the crime charged. *The law presumes every person to be sane unless it is shown to the contrary that he is insane or of unsound mind.* On the question of sanity and insanity, the general rule in this state is that if a person has reason sufficient to distinguish between

right and wrong in relation to the particular act about to be committed, he is criminally responsible. On the other hand, if he should not have reason sufficient to distinguish between right and wrong in relation to the particular act about to be committed, he would be insane in legal contemplation and not criminally responsible for such act.

I charge you that intention is an essential element of any crime and that the burden is on the State to prove such intention beyond a reasonable doubt. While *the burden is not on the Defendant to disprove intention*, nonetheless, if he introduces some competent evidence of insanity, which might tend to negate evil intention in the Defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the Defendant was sane at the time of the alleged crime, and therefore had the requisite criminal intent. *Under Georgia law, every person is presumed to be of sound mind and discretion, but this presumption may be rebutted.* This presumption of sanity may be relied upon by the State and in most cases the State need not bear the burden of introducing evidence as to the sanity of the accused in criminal proceedings. But once the affirmative defense of insanity is raised by the Defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State in order to prove criminal intent of the accused must present evidence to prove the sanity of the accused beyond a reasonable doubt.

I charge you that the question of whether or not the Defendant has successfully rebutted the presumption of sanity in this case is for you to decide. It is not necessary that the Defendant introduce evidence of his insanity sufficient to convince you beyond a reasonable doubt, but rather it is only necessary for him to introduce some competent evidence of his insanity. And when he has done this, the burden shifts

to the State to prove his sanity beyond a reasonable doubt. Under Georgia law, *a person will not be presumed to act with criminal intent* but the triers of the facts, the jurors, may find such intention or the absence thereof upon consideration of the words, conduct, demeanor, motive, evidence of sanity or insanity and all other circumstances connected with the acts for which the accused is prosecuted.

(Emphasis added.)

## APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 81-7649

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CHARLES THOMAS CORN,

Petitioner-Appellee,

versus

RALPH KEMP, Warden
JACKSON DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent-Appellant.

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Appeal from the United States District Court
for the Northern District of Georgia

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(September 16, 1985)

Before HILL, HENDERSON and GARZA*, Circuit Judges.

BY THE COURT:

The petitioner-appellee, Charles Thomas Corn, was convicted of armed robbery and murder on May 26, 1976, in the Superior Court of Clayton County, Georgia, and was

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

subsequently sentenced to death. Upon mandatory review of the death sentence in accordance with Ga. Code Ann. § 2537 (recodified as Off. Code Ga. Ann. 17-10-35), the Supreme Court of Georgia upheld the sentence of death for murder and suspended its imposition for the armed robbery conviction. 240 Ga. 130 (1977). Corn then sought habeas corpus relief in the state courts but was unsuccessful in his efforts.

After exhausting his state remedies, Corn filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia. 28 U.S.C. § 2254. The case was assigned to a magistrate who conducted an evidentiary hearing. The magistrate then filed a report and recommended the denial of all of Corn's claims of constitutional error except one — that the trial court's instructions on malice and intent unconstitutionally shifted the burden of proof on those issues to the defendant. Upon review, the district court rejected this finding of the magistrate. The district court, however, granted the writ on the sole ground that the state trial judge impermissibly disclosed to the jury that Corn had the right to an automatic appeal of his death sentence to the Supreme Court of Georgia. The respondent, Walter Zant, appealed this holding to this court and Corn filed a cross-appeal from the denial of his other grounds for relief.

On June 15, 1983, we reversed the district court's conclusion that Corn suffered a constitutional deprivation when the trial judge informed the jury of Georgia's automatic appeal law. *Corn v. Zant*, 708 F.2d 549 (11th Cir. 1983). We affirmed the remainder of the district court's

order including the rejection of Corn's claim that the trial court's instructions on malice and intent impermissibly shifted the burden of proof. Corn's petition for rehearing and suggestion for rehearing en banc was denied on August 11, 1983.

Corn then petitioned the Supreme Court of the United States for a writ of certiorari. The petition was denied on May 29, 1984. — U.S. —, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). The mandate was issued by this court on May 31, 1984 and made the judgment of the district court on June 20, 1984.

On June 25, 1984, Corn filed a petition for rehearing in the Supreme Court of the United States. On June 26, 1984, the Chief Judge of this court, acting *sua sponte*, recalled the mandate pending the disposition of three cases which were currently pending before the *en banc* court of this Circuit.[1] On August 2, 1984, the Supreme Court denied Corn's motion for a rehearing. — U.S. —, 104 S.Ct. 23, 82 L.Ed.2d 917 (1984).

On April 29, 1985, the Supreme Court held jury instructions including the following language to be unconstitutional:

> The acts of a person of sound mind and discretion are presumed to be the product of a person's will, but the presumption may be rebutted.
>
> [A] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts, but the presumption may be rebutted.

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[1]Drake v. Francis, No. 83-8047; Davis v. Zant, No. 83-8044 and Tucker v. Francis, No. 83-8466.

*Francis v. Franklin*, — U.S. —, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985). The instructions to the jury in Corn's trial were virtually identical to those held unconstitutional in *Franklin* and in this court's subsequent decisions in *Drake v. Kemp*, 762 F.2d 1449, 1452-53 (11th Cir. 1985), and *Tucker v. Kemp*, 762 F.2d 1449, 1500 (11th Cir. 1985).

On August 26, 1985, the State of Georgia moved this court to issue the mandate. This motion is presently pending before us. In light of the *Franklin*, *Drake* and *Tucker* decisions, it is clear that the jury instructions at issue violated Corn's constitutional rights.[2] Therefore, that portion of our prior decision relating to the burden shifting instruction must be vacated.

Accordingly, the motion of the respondent-appellant, Walter Zant, for issuance of the mandate is DENIED. That portion of our opinion in *Corn v. Zant*, 708 F.2d at 558-560, affirming the district court's denial of the writ based on the intent instruction is VACATED and the case is REMANDED to the district court with instructions to grant the writ unless the State of Georgia retries Corn within a reasonable time specified by that court.

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[2]In *Drake*, we held that the error can be harmless if 1) there is overwhelming evidence of the defendant's guilt or 2) the instruction concerned an element of the crime which was not at issue during the trial. We did not reach this issue in our previous opinion because the State failed to raise it. Even if it had been, the error in this case is clearly not harmless. We held in *Drake* that the evidence of *intent* must be overwhelming before an error can be deemed harmless. 762 F.2d at 1453. No such evidence exists in this case. Consequently, intent remains very much an issue.

## APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

No. 81-7649

---

CHARLES THOMAS CORN,

Petitioner-Appellee,
Cross-Appellant.

versus

RALPH KEMP, Warden, Jackson Diagnostic and Classification Center,

Respondent-Appellant,
Cross-Appellee.

---

Appeal from the United States District Court for the Northern District of Georgia

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion September 16, 1985, 11 Cir., 198—, — F.2d —).

(October 25, 1985)

Before HILL, HENDERSON and GARZA*, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

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*Honorable Reynaldo G. Garza, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Albert W. Henderson
United States Circuit Judge

## APPENDIX E

### THE CHARGE OF THE COURT

THE COURT: Ladies and Gentlemen of the Jury, you are trying the case of the State against Charles Thomas Corn who is charged with the offense of armed robbery and murder, being Case Number 8-14,088 in the Clayton Superior Court. This case came before you by virtue of an indictment returned by the Grand Jury of this County which states in substance that the Grand Jurors selected, chosen and sworn, for the County of Clayton, with the grand jurors named herein, in the name and behalf of the Citizens of Georgia, charge and accuse Charles Thomas Corn with the offense of armed robbery in Count One, murder in Count Two; for the said accused in the County of Clayton, State of Georgia, on the 15th day of August, 1975, Count One with the intent to commit theft, took from the immediate presence of Mary Long the following property to wit: United States Currency of the property of the Stop and Go Market of Georgia, Incorporated, of the value of $125 by use of a certain knife, the same being an offensive weapon. And the Grand Jurors aforesaid on their oaths aforesaid in the name and behalf of the Citizens of Georgia further charge and accuse Charles Thomas Corn with the offense of murder; for the said accused in the County of Clayton and State of Georgia, on the 15th day of August, 1975, did unlawfully and with malice aforethought kill one Mary Long, a human being, by stabbing the said Mary Long with a certain knife contrary to the laws of said State, the good order, peace and dignity thereof.

To that indictment the Defendant, Charles Thomas Corn, comes into Court, denies each and every material allegation of the indictment and pleads not guilty.

The indictment is not evidence of guilt and should not be regarded as evidence by you. The indictment together with the Defendant's plea of not guilty forms the issue which you, Ladies and Gentlemen, are to determine.

The Defendant enters upon the trial of this case with the presumption of innocence in his favor and that presumption remains with him until proved guilty. No person shall be convicted of a crime unless each element of such crime is proved beyond a reasonable doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt means exactly what it says. It is a doubt that is founded upon reason. A reasonable doubt may grow out of the evidence or the want of evidence. While the law requires the State to prove the Defendant's guilt of the offenses charged in this indictment to your satisfaction beyond a reasonable doubt, yet the law does not require the State to prove the Defendant's guilt to a mathematical or an absolute certainty. A reasonable doubt is not a vague, imaginary or an arbitrary doubt and neither does it mean the possibility that the Defendant may be innocent. But as the Court has stated to you, a reasonable doubt is a doubt that is founded upon reason by a fair-minded, impartial juror honestly seeking the truth.

A Defendant is not required to testify and I charge you the mere failure of a Defendant to testify in his own behalf shall create no presumption against him. You are the exclusive judges of the credibility or believability of all of the witnesses in this case.

In passing upon the credibility of the witnesses, the Jury has the right to consider all of the facts and circumstances of the case, the witness' manner of testifying, their

intelligence, their means and opportunity for knowing the facts to which they testified, the probability or improbability of their testimony, their interest or their want of interest and the reasonableness or the unreasonableness of their testimony. You may also consider the personal credibility of the witnesses insofar as that may appear from the trial.

The law makes it your duty to reconcile conflicting evidence, if there be such in this case, so as to make all of the witnesses speak the truth and perjury be imputed to none of them. But if there be any evidence in this case in such irreconcilable conflict that this cannot be done, it would then be your duty to believe that evidence which is most reasonable to you and which is most credible to you.

The Court charges you that direct evidence is that which immediately points to the question at issue. Indirect, or sometimes called circumstantial, evidence is that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed.

To warrant a conviction on circumstantial evidence the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis saved that of the guilt of the accused. The term hypothesis as used in this connection refers to and means such reasonable inferences as are ordinarily drawn by ordinary men and women in the light of their experiences in everyday life. All essential facts and circumstances necessary to show the commission of the crimes and to connect the Defendant therewith as the part committing them must be clearly proven and established beyond a reasonable doubt before you could be authorized to convict the Defendant.

Moral and reasonable certainty is all that can be expected in a legal investigation whether dependent upon direct or circumstantial evidence. The true question in criminal cases is not whether it be possible that the conclusion at which the evidence points may be false, but whether there is sufficient evidence as to satisfy the mind and conscious beyond a reasonable doubt.

It is your duty to consider the evidence submitted to you and determine therefrom whether or not the Defendant has made an incriminating statement. An incriminating statement is one made by the Defendant which tends to establish the guilt of the accused or one from which together with other proven circumstances if any guilt may be inferred, or one which tends to disprove some defense set up by the accused.

To make an incriminatory statement admissible into evidence, it must have been made freely and voluntarily without being induced by another by the slightest hope of benefit or the remotest fear of injury. Further if you find in this case that the Defendant also made a statement to a law enforcement officer in response to questions by such law enforcement officer, you must find before he makes a statement that the Defendant was previously informed of his constitutional rights to remain silent and that such statement, if made, may be used against him. You must also find that the Defendant was informed of his rights to consult with an attorney and that if he could not afford an attorney, one would be appointed for him. You must also find that he understood these rights.

If you find that an incriminating statement has been made by the Defendant, but they were not made freely and voluntarily, or that he had been denied any of his

constitutional right as stated by the Court, it would be your duty to disregard the statement. Incriminatory statements are not direct, but they are circumstantial evidence and should be scanned with care and should be received with great caution. The Jury may believe incriminatory statements in whole or in part, believing that which they find to be true and rejecting that which they find to be untrue. It being a question entirely for the Jury's determination.

You are the exclusive judges of the facts and the law in this case; the facts you obtain from the evidence produced to you, the law you take from the Court as given you in these instructions by the Court.

The Court charges you that any verdict which you may render in this case should be arrived at from the facts as you find them to be and then apply the law as given you in these instructions by the Court.

It is your sworn duty to accept these instructions and to apply the law as it is given to you. You are not permitted to change the law nor to apply your own conception of what you think the law should be. Neither sympathy nor prejudice should influence you because the object of all legal investigations is to seek the truth.

Now as I stated the offense charged in Count Number One in the bill of indictment is that of armed robbery and in that connection I charge you that a person commits armed robbery when, with intent to commit theft, takes property of another from the person or the immediate presence of another by use of an offensive weapon. The offense of armed robbery is committed merely by the armed taking of the property of another with intent to commit theft, regardless of whether its value is great or small.

I charge you that if you believe beyond a reasonable doubt that this Defendant did, in the County of Clayton, and State of Georgia, with intent to commit a theft, take from the immediate presence of Mary Long a sum of money of any proven value, that it was the property of Stop and Go Markets of Georgia, Incorporated, and that in thus taking said money he did use an offensive weapon as described in the indictment. Then and in that event you would be authorized to find the Defendant guilty of the offense of armed robbery in Count Number One. If you have a reasonable doubt as to the Defendant's guilt as to the offense of armed robbery as is charged in Count Number One, it would be your duty to give him the benefit of that doubt and to acquit him as to Count Number One.

Now as I have stated, the other offense charged against the Defendant in Count Number Two of this bill of indictment is that of murder. And in that connection I charge you that a person commits murder when he unlawfully and with malice aforethought either express or implied causes the death of another human being. Express malice is that deliberate intention, unlawfully, to take away the life of a fellow creature which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears and where all of the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element in murder and it must exist before any homicide can be murder. Malice, in its legal sense, is not necessarily ill will or hatred; it is the unlawful, deliberate intention to kill a human being without justification or mitigation or excuse, which intention must exist at the time of the killing. It is not necessary, however, that this un-

lawful, deliberate intention should exist for any particular length of time before the killing. If it enters the mind of a slayer the moment before he inflict the fatal wound, that is sufficient.

The law presumes every intentional homicide to be malicious until the contrary appears from circumstances of alleviation and justification, mitigation or excuse. The accused may show such circumstances to the Jury unless such circumstances appear from the evidence produced against the accused. But he is not required to do so. If such evidence produced against the accused, if there be such, discloses the homicide was done without malice, then this presumption that the homicide is malicious does not exist. If, however, the evidence produced against the accused, if there be such, does not disclose that the killing was done without malice, the accused may show that it was done without malice. But he is not required to do so.

I charge you, however, that this presumption which arises against the slayer where an intentional homicide is shown does not arise against the slayer unless it be first shown to a moral and reasonable certainty and beyond a reasonable doubt that the Defendant was the intentional slayer. When and if a killing is proved to your satisfaction to be the intentional act of the Defendant himself the presumption of innocence with which he enters upon the trial is removed from him. But as I charged you heretofore, the evidence of justification or mitigation may be found in the evidence produced against him. If there be no evidence introduced against him to show justification or mitigation and if the evidence introduced shows the homicide to have been committed as charged

in the indictment, the Defendant may, but is not regard to, show mitigation or excuse.

I further charge you that it is for you, the Jury, to say whether the evidence in this case, the testimony and all of the facts and circumstances, sufficiently identify this Defendant as the slayer beyond a reasonable doubt. It is not necessary that the Defendant prove that another person committed the offense.

I charge you that the acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trior of the facts, and that is you, the Jury, in this case, may find such intention upon consideration of the words, conduct, demeanor and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted.

Now, Ladies and Gentlemen of the Jury, I charge you that if you believe beyond a reasonable doubt that the Defendant did, in the County of Clayton, and State of Georgia, with a weapon as described in the indictment with malice aforethought either express or implied did unlawfully and intentionally stab, cut and kill the deceased as charged in the indictment and you believe the weapon as used in the manner used was likely to produce death,

then you would be authorized to convict the Defendant of the offense of murder. If you have a reasonable doubt as to the Defendant's guilt as to the defense of murder, it would be your duty to acquit the Defendant of the offense of murder.

Now as I have stated, the Defendant, Charles Thomas Corn, contends that he is not guilty of the offense as charged in this bill of indictment. He further contends that at the time of the commission of the alleged armed robbery and murder he was a person of unsound mind, that he was insane or mentally incompetent to commit the crime charged in this bill of indictment.

Our law declares that a person shall not be convicted of any crime committed while insane. Now in that connection I charge you that a person shall be considered of sound mind who is neither a lunatic nor afflicted with mental disease and who has arrived at the age of thirteen years. A lunatic person, insane or with mental disease without lucid intervals shall not be found guilty of any crime or misdemeanor with which he may be charged, provided the acts so charged as criminal was committed in the condition of such lunacy or insanity. But if a lunatic has lucid intervals of understanding, he shall answer for what he does in those intervals as if he had no deficiency.

I charge you that in order to constitute a crime, a person must have intelligence and capacity enough to have criminal intent and purpose to commit the crime charged. The law presumes every person to be sane unless it is shown to the contrary that he is insane or of unsound mind. On the question of sanity and insanity, the general rule in this state is that if a person has rea-

son sufficient to distinguish between right and wrong in relation to the particular act about to be committed, he is criminally responsible. On the other hand, if he should not have reason sufficient to distinguish between right and wrong in relation to the particular act about to be committed, he would be insane in legal contemplation and not criminally responsible for such act.

I charge you that intention is an essential element of any crime and that the burden is on the State to prove such intention beyond a reasonable doubt. While the burden is not on the Defendant to disprove intention, nonetheless, if he introduces some competent evidence of insanity, which might tend to negate evil intention in the Defendant at the time of the commission of the alleged crime, then the burden falls upon the State to prove beyond a reasonable doubt that the Defendant was sane at the time of the alleged crime, and therefore had the requisite criminal intent. Under Georgia law, every person is presumed to be of sound mind and discretion, but this presumption may be rebutted. This presumption of sanity may be relied upon by the State and in most cases the State need not bear the burden of introducing evidence as to the sanity of the accused in criminal proceedings. But once the affirmative defense of insanity is raised by the Defendant, once the accused has come forward with some competent evidence of insanity whereby the mental capacity of the accused is placed in issue, then the State in order to prove criminal intent of the accused must present evidence to prove the sanity of the accused beyond a reasonable doubt.

I charge you that the question of whether or not the Defendant has successfully rebutted the presumption of

sanity in this case is for you to decide. It is not necessary that the Defendant introduce evidence of his insanity sufficient to convince you beyond a reasonable doubt, but rather it is only necessary for him to introduce some competent evidence of his insanity. And when he has done this, the burden shifts to the State to prove his sanity beyond a reasonable doubt. Under Georgia law, a person will not be presumed to act with criminal intent but the triors of the facts, the Jurors, may find such intention or the absence thereof upon consideration of the words, conduct, demeanor, motive, evidence of sanity or insanity and all other circumstances connected with the acts for which the accused is prosecuted.

I further charge you that no person shall be convicted of a crime unless each element of the crime is proved beyond a reasonable doubt. You are instructed that ordinarily the Court receives the testimony of witnesses only as to facts of which they have particular and direct knowledge, in cases of science or the professions where the particular knowledge is required for understanding of situations. The law receives the opinion of those deemed and found to be expert in those lines and allows those experts to give their opinions upon certain facts.

I charge you that the opinion of any expert can be based upon hypothetical questions or based upon observations by the experts; even though you are allowed to receive the opinioned testimony of experts, you are not bound by such testimony. The law allows you to receive and consider it along with all of the other evidence in the case in making your verdict. Opinioned evidence is not conclusive or controlling, whether it be expert or non-

expert. It is submitted to you for whatever you think it is worth. The Jury, upon the review of the case or by reference to their own experience, may discard the opinions of experts entirely. Whether the learning, skill and experience if any of a witness really entitles his opinioned testimony to be considered as that of an expert is at last to be determined by the Jury itself. Expert testimony is to be weighed and judged like any other and the same tests are to be applied thereto. It is not necessarily conclusive or controlling even when uncontradicted by testimony of other experts. But its weight and value are to be determined by the Jury who should consider it in connection with all of the other evidence in the case, the means and knowledge of the experts, the reasons which he assigns for his opinion, and the truth or falsity of the facts assumed and the hypothetical questions put to him, if any.

I charge you further that it is a settled doctrine of law that opinions of witnesses other than experts are admissible in respect to sanity or insanity, provided that such opinion be accompanied by the facts upon which they are found.

I charge you that the credibility of witnesses presents a question of fact for you, the Jury. In determining the issue of sanity or insanity, the Jury may also consider the acts and mental condition of the accused if revealed by the evidence before and after the commission of the alleged offenses, and the declarations or statements, if any, of the Defendant made at the time of the alleged offense or reasonably close thereto as proof of his mental condition at the time of the alleged crime.

I charge you that the law of this State provides that the trial judge shall instruct the Jury that in case of acquittal by reason of insanity, the Jury shall specify in their verdict that the accused was acquitted because of mental irresponsibility or insanity at the time of the commission of the act. And such a verdict of acquittal shall be returned by the Jury, it shall therefore become the duty of the trial judge to retain jurisdiction of the prisoner and then to order the prisoner to be confined at the Central State Hospital at Millegeville, Georgia, or in any other State Hospital, wherever the same may be located wherein the mental patients are kept, and to provide in said order that such person shall not be released from said hospital except upon compliance with the terms and provisions of existing law of Georgia under which other mental patients are discharged.

Now, Ladies and Gentlemen of the Jury, if you find from the evidence submitted to you that the Defendant, Charles Thomas Corn, committed the offenses of armed robbery and murder, as charged in the indictment, and you further find that he was of unsound mind, insane or mentally incompetent as legally defined for you, then—let me read that again.

Ladies and Gentlemen of the Jury, if you find from the evidence submitted to you that the Defendant, Charles Thomas Corn, committed the offense of armed robbery and murder as charged in the indictment, and you further find that he was of unsound mind, insane or mentally incompetent as legally defined for you at the time of the alleged commission of the crime charged in this bill of indictment then and in that event it would be your duty to acquit the Defendant. And the form of your

verdict would be: "We, the jury, find the Defendant not guilty by reason of insanity." If that be your verdict, write it on the Jury Verdict Form, date it, sign it by your foreman or forelady and return and publish the same here in open court. If, however, from a consideration of the evidence you determine that the Defendant was not mentally irresponsible or insane at the time of the commission of the offenses charged, you should proceed further as the Court has instructed you or will instruct you hereafter. Your verdict should be in writing and entered upon one of the Jury Verdict Forms attached to the indictment. It should be dated, signed by your foreman or forelady, returned and published here in open court.

The thirteenth, or alternate, juror was selected to serve in the event of any misfortune to a member of the chosen panel. To date, such contingency has not arisen, but the alternate juror is not excused. The alternate juror shall remain in custody of the Bailiff at all time pending further instructions from the Court. The alternate juror is instructed to discuss this case with no one or tell anyone how you would have voted unless, of course, you are called in to deliberate in replacing some member of the chosen panel.

Now, I want to emphasize to you that anything the Court did or said during the trial of this case was not intended to and did not intimate, hint or suggest to you whether the State or the Defendant should prevail in this case. The Court's interest in the matter was that the case be presented fairly according to law and that you, as honest, conscientious and impartial jurors, consider

the case as the Court has instructed you and return a verdict that speaks the truth as you find the truth of the case to be.

It is now your sole responsibility to determine guilt or innocence of the Defendant, considering, of course, all of the evidence as presented to you and the law as given you in charge by the Court.

In arriving at your verdict, the law of Georgia specifically states that you must not discuss or consider the subject of penalty or punishment, because your duty at this time is confined to the determination of guilt or innocence of the Defendant on each count.

In the event you find the Defendant guilty, the Court shall resume the trial and will conduct a pre-sentence hearing before you, the Jury, at which time the matter of punishment to be imposed will be submitted to you.

Upon retiring to the Jury Room, you will select one of your number to act as foreman or forelady who will preside over your deliberations and who will sign the verdict to which all twelve of you freely and voluntarily agree. Your initial conduct upon entering the Jury Room is a matter of importance because it is not wise immediately to express a determination to insist upon a certain verdict. If your sense of pride is aroused, you may hestitate to change your position even if you decide you were wrong. Consult with one another and consider each other's views. Each of you must decide this case for yourself, but you should do so only after a discussion and consideration of the case with your fellow jurors. Do not hesitate to change an opinion if convinced that it is wrong; however, you should never surrender honest

convictions or opinions in order to be congenial or to reach a verdict solely because of the opinions of other jurors.

In the event you acquit this Defendant upon both counts, the form of your verdict would be: "We, the Jury, find the Defendant . . ." naming him ". . . not guilty," naming the count or counts on which you find him not guilty. If you find him not guilty by reason of insanity the form of your verdict would be: "We, the Jury, find the Defendant not guilty . . ." naming him, ". . . by reason of insanity." In the event you do not acquit this Defendant on either or both counts, the form of your verdict would be: "We, the Jury, find the Defendant . . ." naming him, ". . . guilty," naming the count or counts on which you find him guilty.

The Jury may now retire and begin your deliberation after you have received the indictment and the objects of evidence that were admitted in the case.

Retire, Ladies and Gentlemen.

EDITOR'S NOTE

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85-1218

No._____

In The
**Supreme Court of the United States**
October Term, 1985

RALPH KEMP, WARDEN,

Petitioner,

v.

CHARLES THOMAS CORN,

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTHCIRCUIT**

# RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## ISSUES PRESENTED

-1-

The Eleventh circuit properly recalled the mandate, sua sponte in order to prevent a miscarriage of justice and did not abuse its discretion.

-2-

The Eleventh Circuit properly ruled that the charge in the instant case was violative of Sandstrom v. Montana, 442 U.S. 510 (1979).

-3-

The Eleventh Circuit properly concluded that the Sandstrom violations were not harmless error.

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## REASONS TO DENY THE WRIT

### A. THE ELEVENTH CIRCUIT PROPERLY RECALLED THE MANDATE, SUA SPONTE IN ORDER TO PREVENT A MISCARRIAGE OF JUSTICE AND DID NOT ABUSE ITS DISCRETION.

The Eleventh Circuit, after denying respondent's motion for rehearing, recalled the mandate sua sponte. This was done because the Court was unable to distinguish the jury charge in Corn v. Zant, 708 F.2d 549 (11th Cir., 1983); 714 F.2d 159 (11t6hCir., 1983) from the one that this Court disapproved in Francis v. Franklin, _____U.S._____, 104 S.Ct. 1965 (1985).

Rather than the mere duplication of two sentences in the charges referred to above, the substantial aspects of the charges in Francis, supra, and Corn, supra are very similar. Both cases deal with burden shifting instructions which impermissibly shift the burden of proof to the defendant.

This Court should not concern itself with the actions of the Eleventh Circuit in recalling the mandate sua sponte. Absent an abuse by the Eleventh Circuit, its actions are not subject to review by this Court. Such an action is not a "special and important reason" for granting the Writ as required. See: Rule 17, Rules of the Supreme Court of the United States; NLRB vs. Pittsburgh S. S. Co., 340 U.S. 498 (1951).

Petitioner argues that the failure of this Court to grant certiorari to respondent upon his application from the original ruling of the Eleventh Circuit indicates a basis for the Writ to be granted in the instant petition. As has been held, denial of certiorari imports nothing as to the merits of the case. Brown vs. Allen, 344 U.S. 443, 73 S.Ct. 397 (1953).

Under the Rules of the United States Court of Appeals for the Eleventh Circuit, Rule 27, a mandate may not be recalled except to prevent injustice. Clearly, recall of the mandatein the instant case was done to prevent a manifest injustice from being done to respondent. Such a recall cannot be considered an abuse of the Court's power in light of the Francis decision. Rather, the failure to redress the obvious inconsistencies in the

original decision would have been abusive.

The Eleventh Circuit should be commended for recalling themandate and correcting the inconsistencies in the original decision, and should not be reversed. If the Court's action was out of order or an abuse of power, the Court would have granted petitioner's petition for rehearing en banc. Clearly, the entire Court concurred in the recall of the mandate, sua sponte and would not have taken such unusual action if it did not believe that the original opinion was substantially incorrect.

Petitioner's argument that other circuits could utilize a recall of mandate to indefinitely delay a case is totally without merit. Except where manifest injustice may be done if the mandate is not recalled, it would be unlikely that the courts would use such a procedure to delay any case. The only reason that the Eleventh Circuit recalled the mandate was to correct the obvious error of its prior decision.

**B. THE ELEVENTH CIRCUIT PROPERLY RULED THAT THE CHARGE IN THE INSTANT CASE WAS VIOLATIVE OF SANDSTROM V. MONTANA, 442 U.S. 510 (1979).**

This Court has held that jury instructions virtually identical to those in the instant case are impermissibly burden-shifting Francis v. Franklin, ____U.S._____, 104 S.Ct. 1965 (1985).

The first question presented in Francis rests upon the deicision that the following language in the jury instructions violated Sandstrom:

> "The acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumptrion may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probably consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of facts, that is, the jury may find criminal intention upon a consideration of the words, conduct, demeanor, motive, and all other circumstances connected with the act for which the accused is prosecuted." Petition for Writ of Certiorari, Francis v. Franklin. pp.5-6

The operant language in the jury instructions at respondent Corn's trial was virtually identical:

> "I charge you that acts of a person of sound mind and discretion are presumed to be the product of a person's will, but this presumption may be rebutted. A person of sound mind and discretion is presumed to intend the naturaland probableconsequences of his acts. If such person uses a weapon in a manner in which such weapon is ordinarily employed to produce death and thereby causes the death of a human being, the law presumes the intent to kill. However, this presumption may be rebutted. A person will not be presumed to act with criminal intention, but the trier of the facts, and this is you, the jury, in this case, may find such intention upon consideration of the words, conduct, demeanor, and motive, if any, and all facts and circumstances connected with the act for which the accused is prosecuted." Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, Corn v. Zant, p. 12.

Apart from insignificant choices of phraseology, the only difference between these two instructions is the addition in the Corn instruction of the sentence concerning a weapon. That sentence, however, also contains "the law presumes" language that is the crux of the Sandstrom problem in these cases. Accordingly, the instruction in Corn is even more problematic than that in Francis. Thus, this Court's decision in Francis controls the correct disposition in Corn. Since this Court finds the Francis instruction to violate Sandstrom, then a fortiori the instruction in Corn does so as well.

It should be noted that the very panel that had reversed the lower courts in Corn was the panel that issued the opinion reversing its own prior decision. Such action was not taken lightly. Respondent had prevailed before the Magistrate on the Sandstrom issue. In fact, the orignal opinion of the Eleventh Circuit was the only federal court to deny relief to the Respondent. Therefore, the action of the Eleventh Circuit5 in granting relief is indicative of the substantive nature of respondent's claims. The characterization of the jury charge in Corn by the petitioner as being substantially different from Francis is misleading.

If anything, the charge in Corn is nore violative of the Constitution than the charge in Francis, supra. Therefore, this Court should not grant the writ based upon any alleged distinction between Corn and Francis. The decision of the Eleventh Circuit to reverse the respondent's conviction was a

logical application of its prior decisions as well as this Court's decision in Francis. Obviously, the Eleventh circuit considered the charge as a whole and did not isolate two sentences on reversing respondent's conviction. Review by this Court is wholly unnecessary.

**C. THE ELEVENTH CIRCUIT PROPERLY CONCLUDED THAT THE SANDSTROM VIOLATIONS WERE NOT HARMLESS ERROR.**

In the instant case, respondent's defense centered on insanity and his lack of intent during the commission of the alleged crimes. Respondent presented the testimony of a psychiatrist that he was insane at the time of the murder. The State's psychiatrist admitted that respondent was severely emotionally disturbed and had no opinion of respondent's sanity during the murder. It is not contested that respondent has a low IQ of 69. The only evidence of sanity presented by the State was the opinions of respondent's wife and mother-in-law, neither of whom had any education or training in psychology or psychiatry. At no time did respondent concede the issue of sanity or intent. These facts do not meet the criteria of harmless error for a Sandstrom violation. Connecticut v. Johnson, 460 U.S. 73 (1983). The likelihood is great that the jury applied the erroneous standards enunciated in the charge in reaching its decision.

Petitioner agrues that there could not be harmful error in Corn's charge because the jury must have rejected respondent's defense in reaching its verdict. Such reasoning is circuitous. Under such an analysis, no burden-shifting instruction would be harmful error since the jury must have decided that the defendant was sane when the crime was committed. Such a result cannot be intended by this Court. Otherwise, there would be no need for deciding whether a particular instruction violated Sandstrom when such violation must be harmless. Any presumption as to the effect of an offensive instruction must be that harm is presumed. Particularly in a case such as Corn, where sanity and intent were contested, the Court must presume any burden-shifting error in

the charge to be harmful. The Fifth Circuit (prior to dividing into the Fifth and Eleventh Circuits) has held that an unconstitutional jury instruction on an element of a crime can never be harmless error. Hammontree v. Phelps, 605 F.2d 1371, 1380 (5thCir., 1979). Such an analysis is more logical than to arbitrarily review each case's instruction and "guess" what a juror may have understood. Administratively, it is easier to rule an offensive instruction to be harmful if it shifts the burden of proof to a defendant, than to speculate upon a juror's perception of the instruction.

In the instant case, there is no question that respondent raised sanity and intent as his defense at his trial. Therefore, petitioner's analysis is faulty in applying cases where the defendant waived his or her defense during trial to the instant case. See:Connecticut v. Johnson, supra. As applied to the facts of this case, the jury instruction could not be harmless error. Rather, it deprived respondent of his only defense to the murder. What greater harm should respondent have to show in order to get a reversal of his conviction? Given the paucity of evidence of respondent's sanity, it would be a miscarriage of justice to reinstate respondent's conviction. Therefore, this Court should deny certiorari to the petitioner.

## CONCLUSION

Respondent has shown that the Eleventh Circuit's recall of the mandate was proper and is not an abuse of discretion by the Eleventh Circuit.

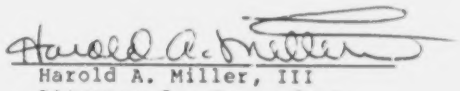
Secondly, the charge is substantively similar to that in Francis, supra. Therefore, reversal of respondent's conviction is mandated in order to be consistent.

Finally, petitioner argues that the instant instructions, though unconstitutional, constitute harmless error. When a defendant raises sanity and intent as a defense to a crime, burden-shifting instructions cannot be held to be harmless.

Therefore, for the reasons stated above, the writ should be

denied to the petitioner. The Eleventh Circuit carefully considered the State's claims and found them to be meritless. Therefore, it would be a travesty to grant the writ of certiorari and reinstate respondent's conviction.

Respectfully submitted,



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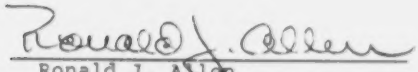

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**CERTIFICATE OF FILING**

Counsel for respondent hereby certifies that he has submitted his application for admission to practice before this Court with ten copies of repondent's brief is opposition to granting the writ of certiorari and motion for leave to proceed in forma pauperis by despositng the same in the U. S. Mail, with prepaid first class postage and properly addressed to the Clerk of this Court. This mailing was made on March 6, 1986, within the time prescribed by this Court.

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SWORN TO and SUBSCRIBED
before me this 6th
day of March, 1986.

Linda C. Miller
Notary Public

My commission expires: September 26, 1986

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